



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

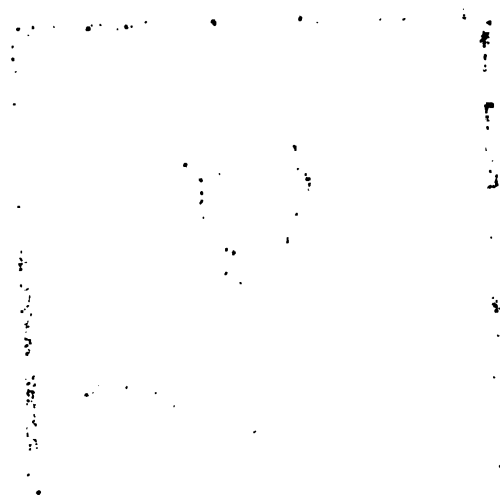
### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

3 2044 078 700 739



**HARVARD LAW SCHOOL  
LIBRARY**



Digitized by Google









Feb-18 4  
DISTRICT OF COLUMBIA REPORTS.

Volume 6.

---

## REPORTS OF CASES

ARGUED AND ADJUDGED IN

# THE SUPREME COURT

OF THE

## DISTRICT OF COLUMBIA,

SITTING IN GENERAL TERM,

From its Organization in 1863 to November 19, 1868.

(INCLUDING ALSO A FEW SPECIAL TERM CASES.)

---

REPORTED BY

FRANKLIN H. MACKEY.

---

WASHINGTON, D. C.

THE LAW REPORTER PRINT, 503 E STREET.

1889

*Rec. Sept. 30, 1889.*

## PREFACE.

---

From the organization of the Supreme Court of the District of Columbia in 1863 to the date of the first case reported in Mr. Justice Mac Arthur's Reports, elapsed a period of about ten years, during which time no reported decisions of that Court were ever published. After much labor and diligent search I have succeeded in gathering from various sources quite a number of the more important of its decisions during that period. About half of these will be found in this volume. Another which I hope soon to publish will contain the remainder. These two volumes will consummate my efforts to fill as far as possible this gap of ten years and, thereby, to furnish a continuous series of reported decisions of the Supreme Court of the District from the date of its organization to the present day. Still another hiatus of ten years in the case law of the District of Columbia occurs, however, between the dates of the last decision in 5th Cranch and the first decision in the present volume. This, also, I had thought to fill; but after thoroughly investigating the matter I feel satisfied that there is no possibility of doing so; the decisions of that period were mostly oral, and the few that were written have, with two or three exceptions, been lost.

The five volumes of Cranch, therefore, together with these two volumes, the three volumes of Mac Arthur's Reports, the one volume of Mac Arthur & Mackey, and the six volumes of Mackey's Reports—seventeen volumes in all—must be considered as embodying the entire case law of the highest courts of this District from the session in 1801 down to 1888. This being so, there is no reason why the series should not be numbered consecutively, commencing with 1st Cranch as "1st District of Columbia Reports." I have, therefore, appended here a table showing the volumes constituting these reports and how they may hereafter be cited. In doing this I have only followed a plan adopted by the Supreme Court of the United States and most of the State courts.

I may add that among the decisions reported here and in the volume which is expected shortly to follow this; a few will be found to have been decided by the Special Term. In every such case the fact is noted at the head of the report. They are included because of their importance, and, also, because they seem to be well considered cases.

FRANKLIN H. MACKEY.

*April 28th, 1889.*

TABLE SHOWING THE VOLUMES CONSTITUTING  
THE DISTRICT OF COLUMBIA REPORTS,  
AND HOW THEY MAY BE CITED.

---

1 Cranch	may be cited as.....	1	Dist. Col.
2    "	"       "	2	"   "
3    "	"       "	3	"   "
4    "	"       "	4	"   "
5*   "	"       "	5	"   "
6 District of Columbia	"       "	6	"   "
7    "       "	"       "	7	"   "
1 Mac Arthur	"       "	8	"   "
2    "	"       "	9	"   "
3    "	"       "	10	"   "
Mac Arthur & Mackey	"       "	11	"   "
1 Mackey	"       "	12	"   "
2    "	"       "	13	"   "
3    "	"       "	14	"   "
4    "	"       "	15	"   "
5    "	"       "	16	"   "
6    "	"       "	17	"   "

---

\*There is a digest accompanying the five volumes of Cranch, which has been bound in uniform style with those volumes and erroneously entitled by the publisher "Cranch's Reports, Volume 6;" it is not a volume of reports, and, of course, has never been cited as such. In arranging the above table I have taken no notice of it.





## TABLE OF CASES.

---

Adair <i>vs.</i> Browning.....	243
Adams <i>vs.</i> Adams <i>et al.</i> .....	45
Adams <i>vs.</i> Horr.....	40
Alden <i>vs.</i> Hinton.....	217
Alexander <i>vs.</i> Douglass.....	247
Allen, Salter <i>vs.</i> .....	182
Arrison <i>vs.</i> Cook.....	337
Barnes, Mayor of Washington <i>vs.</i> .....	230
Barney <i>vs.</i> Barney.....	1
Barney <i>vs.</i> DeKraft.....	361
Barth <i>vs.</i> Heider.....	312
Beckett, Brown <i>vs.</i> .....	258
Birdsall <i>vs.</i> Welch.....	316
Bowen, United States <i>ex rel.</i> Langley <i>vs.</i> .....	196
Bowie, Thompson <i>vs.</i> .....	91
Bozzle, Cassin <i>vs.</i> .....	260
Brown <i>vs.</i> Beckett.....	253
Browning, Adair <i>vs.</i> .....	243
Cahill <i>vs.</i> Haines.....	214
Carroll, Mead <i>vs.</i> .....	338
Carroll, Roche <i>vs.</i> .....	79
Cassin <i>vs.</i> Bozzle.....	260
Cheever <i>vs.</i> Wilson.....	149
Coleman, Purcell <i>vs.</i> .....	59, 87
Cook, Arrison <i>vs.</i> .....	337

Corporation of Georgetown <i>vs.</i> Davidson.....	278
Corporation of Washington, Herfurth <i>vs.</i> .....	288
Dawson <i>vs.</i> Woodward.....	301
Davidson, Corporation of Georgetown <i>vs.</i> .....	278
DeKraft, Barney <i>vs.</i> .....	361
Douglass, Alexander <i>vs.</i> .....	247
Dugan, <i>In Re</i> .....	131
Frisbie, Whitney <i>vs.</i> .....	262
Georgetown, Corporation of, <i>vs.</i> Davidson.....	278
Griffin, United States <i>vs.</i> .....	53
Haines, Cahill <i>vs.</i> .....	214
Hall, <i>In Re</i> .....	10
Hall, Spalding <i>vs.</i> .....	123
Hampton, The, United States <i>vs.</i> .....	75
Harmon <i>vs.</i> Moffit.....	297
Hatfield <i>vs.</i> Hatfield.....	80
Hayes <i>vs.</i> Johnson.....	174
Heider, Barth <i>vs.</i> .....	312
Herfurth <i>vs.</i> Corporation of Washington.....	288
Hinton, Alden <i>vs.</i> .....	217
Horr, Adams <i>vs.</i> .....	40
Hotchkiss, <i>In Re</i> .....	168
Huyck, United States <i>vs.</i> .....	304
<i>In Re</i> Dugan.....	131
<i>In Re</i> Hall.....	10
<i>In Re</i> Hotchkiss.....	168
Johnson, Hayes <i>vs.</i> .....	174
Johnson, Miller <i>vs.</i> .....	51
Kelly, Owen <i>vs.</i> .....	191
Kelly, Worch <i>vs.</i> .....	252

# TABLE OF CASES

IX

Kilbourn & Latta <i>vs.</i> King.....	310
Kimmell, Selling <i>vs.</i> .....	273
King, Kilbourn & Latta <i>vs.</i> .....	210
Langley, Unites States <i>ex rel. vs.</i> Bowen.....	196
Mayor of Washington <i>vs.</i> Barnes.....	230
Mead <i>vs.</i> Carroll.....	338
Mears, Sally, United States <i>vs.</i> .....	36
Metropolitan R. R. Co., Redwood <i>vs.</i> .....	302
Miller <i>vs.</i> Johnson.....	51
Moffit, Harmon <i>vs.</i> .....	297
Morehouse, Swan <i>vs.</i> .....	225
Owen <i>vs.</i> Kelly.....	191
Purcell <i>vs.</i> Coleman.....	59, 87
Redwood <i>vs.</i> Metropolitan R. R. Co.....	302
Riggs, Thompson <i>vs.</i> .....	99
Roche <i>vs.</i> Carroll.....	79
Sally Mears, United States <i>vs.</i> .....	36
Salter <i>vs.</i> Allen.....	182
Schuehardt <i>vs.</i> Thornton.....	294
Selling <i>vs.</i> Kimmell.....	273
Spalding <i>vs.</i> Hall.....	123
Surratt, United States <i>vs.</i> .....	306
Swan <i>vs.</i> Morehouse.....	225
The Hampton, United States <i>vs.</i> .....	75
Thompson <i>vs.</i> Bowie.....	91
Thompson <i>vs.</i> Riggs.....	99
Thornton, Schuehardt <i>vs.</i> .....	294
The Tropic Wind, United States <i>vs.</i> .....	357

United States, <i>ex rel.</i> Langley, <i>vs.</i> Bowen.....	196
United States <i>vs.</i> Griffin.....	53
United States <i>vs.</i> Huyck.....	304
United States <i>vs.</i> Sally Mears.....	36
United States <i>vs.</i> Surratt.....	306
United States <i>vs.</i> The Hampton.....	75
United States <i>vs.</i> The Tropic Wind.....	351
Welch, Birdsall <i>vs.</i> .....	316
Whitney <i>vs.</i> Frisbie.....	262
Wilson, Cheever <i>vs.</i> .....	149
Woodward, Dawson <i>vs.</i> .....	301
Worch <i>vs.</i> Kelly.....	252

REPORTS OF CASES  
DECIDED IN  
THE SUPREME COURT  
OF THE  
DISTRICT OF COLUMBIA.

---

SAMUEL CHASE BARNEY, JR., EDWARD D. BARNEY AND OTHERS, BY THEIR NEXT FRIEND, JOHN W. DEKRAFT,

vs.

SAMUEL CHASE BARNEY.

---

1. Where a bill is filed having for its subject-matter the estates and persons of infants, and service of the subpoena is had upon the defendant, the parties are at once in Court and the children in its custody and care, and it is a grave offense to remove them, pending the proceedings, from the Court's jurisdiction for the purpose of rendering the exercise of its authority and protection impotent.
2. An order upon the defendant to show cause why he should not be punished for contempt for so removing the children is an interlocutory order and may be passed by a justice at Chambers as well as in Term.
3. Where in such a case the defendant remains in contempt by refusing to comply with the order of the Court requiring him to bring the wards within the jurisdiction of the Court, his answer to the bill will be stricken from the files and the complainant will be allowed to proceed as in case of default.

In Equity. No. 1,846. Decided May 14, 1863.

MOTION to vacate an order passed in Chambers.

THE BILL in this case was filed for the purpose of having the Court adjudge the defendant unfit and incompetent to

execute and perform the office of guardian to his minor children, and praying "that he be enjoined from exercising any authority or control over them or either of them, their persons or property, and that he be specially directed and enjoined not, either by himself, his agents or other persons, to interfere with the custody, maintenance or education of the said minor children, or either of them, during their respective minorities." After the bill was filed, and service of the subpoena had, the defendant removed the children from the jurisdiction of the Court; whereupon an order was obtained in Chambers requiring him to show cause why he should not be punished for contempt for having so removed them. Afterwards this motion was made by the defendant to vacate said order, and the same was heard in the first instance in General Term. The facts going to the merits of the case appear in the opinion of the Court.

MESSRS. RICHARD S. COXE and T. M. BLOUNT, for complainant.

MR. WALTER D. DAVIDGE, for defendants.

MR. CHIEF JUSTICE CARTER delivered the opinion of the Court:

The motion to set aside or vacate the order made by the Chief Justice of this Court on the 22d of March last must be denied:

1. Because we are disposed to regard the order as a mere interlocutory order, such as a judge possessing plenary equity jurisdiction may make at Chambers as well as in Term.

It is true that the petitioner asks for some things to be done which it is the proper office of an injunction to enforce; for example, such as enjoining the defendant from taking any proceedings in the Orphans' Court of this District, or in any other judicatory in respect to these infants, and the further command that the defendant return these infants to this District. But we are disposed to look at the

substance of this petition in connection with the order passed upon it, and regard it as it properly is, an order to show cause at this term of the Court why the defendant should not be punished for a contempt of the authority of this Court in removing from its jurisdiction the infant plaintiffs in this suit.

This is the substance of the petition upon which the Chief Justice endorsed "allowed." Now, though this petition might contain a prayer or request that other things should be done, which, upon consideration, this Court would refuse to order to be done, that would, in a court of equity, be no reason for refusing to do what was properly asked for and just and proper to be done.

2. Upon the merits of this motion the material and undisputed facts are simply these:

On the 24th day of February last the infant children of the defendant by their next friend filed their bill in the late Circuit Court of this District against their father, charging that his habits and character were such as disqualified him from acting as the guardian of their estates and persons.

That after such bill was filed and a subpoena issued and served upon the defendant, he took these children from the custody of the person having it at the time the suit was commenced, and removed out of the jurisdiction of this Court with the intent and purpose of rendering the exercise of its authority and protection impotent and of no effect; that this act was done, if not upon the suggestion, at least under the advice and approval of his counsel.

We are of the opinion that the moment this suit was commenced and the subpoena was served upon the defendant, these parties were in Court, and these infant children were in its custody and under its care and protection. In other words, they became, in the language of the law, "wards of this Court," and to remove them beyond its jurisdiction and control, and especially if with intent to evade its authority, is a grave offense.



The order of the Court is:

1. That the motion to dissolve the order granted on the 22d of March be denied.

2. That the defendant return, or caused to be returned, said infant children to the custody of the person or persons in this District whence they were removed within ten days from the date of this order.

3. That in default of so doing the answer of the defendant filed in this cause be stricken from the files of this Court, and the plaintiff be allowed to proceed in the cause in the same manner as though default had been made in answering the bill of complaint in this cause.

4. That either of the parties be at liberty to apply to this Court for such directions as to the custody and control of said infant children during the pendency of this suit as to them seem meet and proper.

5. That the defendant pay the costs of this motion to be taxed by the clerk of this Court.

---

NOTE.—It may not be without interest to give here the opinion of Judge Purcell delivered in the Orphans' Court of the District, March 21st, 1863, upon a hearing of another branch of this, at that time, much litigated case, inasmuch as it presents, among other interesting questions, the views of that learned judge upon the very point afterwards raised and decided by the General Term in the foregoing opinion. It may be added that the opinion of Judge Purcell has never before been published.

Samuel Chase Barney	}	<i>In the Orphans' Court of the District of Columbia, March 21st, 1863.</i>
<i>vs.</i>		
John W. DeKraft, et al.	}	

PURCELL, J. In the above case this Court on the 25th day of January, 1862, pronounced a final decree appointing Dr. Harvey Lindsley (at discretion) guardian to the above

minor children; the Court being of the opinion that Samuel Chase Barney had lost his marital rights as husband and natural guardian by the decree of divorce obtained in Jasper County, in the State of Iowa. By that decree he was forever separated from his wife, and the custody of the said minor children was taken from him and given to the mother. It appeared on the face of the decree that the Court was a tribunal of competent jurisdiction, both over the parties and the subject matter, and that the said decree was duly and properly authenticated according to the act of Congress in such cases made and provided. And this Court held that the divorce was sufficient to exclude Samuel Chase Barney from the guardianship of the property of the said children, without reference to *all* the other facts against him in the case. Also that inasmuch as the said decree of divorce declared that Samuel Chase Barney had received timely notice of the pending of the suit by the proper publication required by law and notice sent to his residence, it could not be enquired into collaterally by this Court, and authorities were cited to that effect, and that such a decree was not *ex parte*. This Court at the same time stated another fact which was entitled to much consideration. To wit: that the will of Edward DeKraft, by whom the whole estate in question was devised, the father of Mary E. DeKraft, who intermarried with the said Samuel Chase Barney and who was the mother of the said minor children *expressly* declared that "*no husband of his daughter should ever at any time control the estate so devised.*" From this decision the said Samuel Chase Barney appealed to the Circuit Court of the District, and by that Court the decision of this Court was reversed. An appeal was then taken by J. W. DeKraft, next friend of the children, to the Supreme Court of the United States, which was dismissed by that tribunal for want of jurisdiction. (See DeKraft vs. Barney, 2 Bl., 704). The Circuit Court (opinion delivered by Judge Merrick\*) in

---

\*See this opinion in the appendix.

reversing the decision of this Court, made, and elaborately discussed, three points. 1st. That the decree of divorce rendered in Iowa, could not be received in evidence for any purpose in the present controversy. 2nd. That the will of Edward DeKraft did not apply to the personal custody of the minor children, but only to the property and that although the language of said will was clear and explicit that "no husband" of his daughter should ever at any time control the estate, yet as natural guardian, Samuel Chase Barney, the father, was entitled to preference in the control of said property, provided he gave sufficient bond and sureties as natural guardian. 3rd. That the statute of Maryland of 1798, in reference to the removal of guardians by the Orphans' Court, did not apply to Samuel Chase Barney as natural guardian. In reference to the points thus considered by the Circuit Court, and upon the soundness of their decision, it would perhaps be unbecoming for this Court to comment, although it may not be amiss to quote the express language of the sections of the statute of Maryland of 1798, which was held by the Circuit Court (in their 3rd and last point) not to apply to the present case. In sub-chapter 12, chapter 101 of that statute, different classes of guardians are mentioned. "Natural guardians" and "testamentary guardians." Then sub-chapter 15 provides that "the Court (Orphans') may, upon application of an infant or any person in his behalf, suggesting improper conduct *in any guardian whatever*, either in relation to the care and management of the property and person of any infant, inquire into the same, and at their discretion, remove such guardian and make choice of another, who shall give security and conduct himself in the manner hereinbefore prescribed and shall receive the property and custody of the ward." Could language be more comprehensive or explicit? This statute is in force in this District, and it expressly provides that the Orphans' Court may remove "any guardian" for improper conduct, either in regard to the

*person* or *property* of the ward. Clearly embracing all guardians, and this has been the opinion of the ablest jurists both of this District and the State of Maryland. On the second day of March, 1863, the Circuit Court issued their mandate from their clerk's office, directing this Court to cite Samuel Chase Barney to give bond with sufficient securities to be approved by this Court, &c., &c.

Said mandate was delivered to the clerk of this Court on the 4th day of March, 1863, the day after the said Circuit Court was abolished by Congress. The Circuit Court was the proper appellate tribunal, and this Court would feel bound to respect its mandate, but it appears from the certificate, under seal of the clerk of that Court, who was also clerk of the Court of Chancery, that on the 24th day of February, 1863, a bill in equity had been filed in behalf of said minor children, who were then in the custody of Dr. Harvey Lindsley, their duly appointed guardian by this Court, the property being also in his possession; said bill alleging unfitness of said Barney because of gross immorality and incompetency, rendering him unfit to have the custody of the said minor children, or to have the management of their property; consequently, the said minor children became "wards in chancery" from the filing the said bill and the issuing the process thereon, and service on said Samuel Chase Barney on 26th of February, which proceedings operated as a *supersedeas* to the action of all other courts and persons. (It was stated to this Court, and not denied by the opposite counsel, that the Circuit Court had agreed to hear an argument, and examine authorities, as to the propriety of having ordered the mandate, but did not, owing to some misunderstanding between the Court and counsel, R. S. Coxe, Esq.) The above doctrine is very clearly stated by Judge Story, in his very able work upon Equity Jurisprudence, vol. 2, sections 1352 and 1353. He says, "Wherever a suit is instituted in the Court of Chancery relating to the person or property of an infant, although he is

under any general guardian appointed by the Court, he is treated as a ward of the Court and as being under its especial cognizance and protection." In all cases where an infant is a ward of chancery no act can be done affecting the person or property or state of the minor, unless under the express or implied direction of the Court itself. Every act done without such direction is treated as a violation of the authority of the Court, and the offending party will be arrested upon proper process for the contempt, and compelled to submit to such orders and such punishments by imprisonment as are applied to other cases of contempt. See also *Duke of Beaufort vs. Wellsley*, 2d Russell, 20 and 21.

In this case the rights of the father, as natural guardian, were involved, and he was by the Court adjudged unfit to have the custody of his children. *Goodall vs. Harrison*, 2d P. Williams, 562. *Butler vs. Freeman*, Ambler's Reports, 302. 2d Bligh's Reports, 137. Thus it will be seen that, by the foregoing high authorities, should this Court regard the mandate issued by the late Circuit Court, or "do any other act affecting the person, property or state of the minors" from the time they became "wards of chancery," it would be guilty of contempt of the Court of Chancery. And may not the late Circuit Court have rendered themselves liable, the mandate having been issued subsequent to the filing of the said bill in behalf of the minor children? Filing a bill in Chancery, on behalf of infants, makes them "*wards of court*" says Maddox in his Chancery Practice, vol. 1, page 432. See also the authorities referred to in the margin by the learned author.

Indeed, the Circuit Court on page 17 of their opinion already referred to, say that the Court of Chancery affords ample relief in the case of minors when properly invoked.

But if any doubts existed, as to the principle in chancery, as above stated from the foregoing authorities and facts, they were removed on the awarding of the injunction on

yesterday, the 20th inst. by the Hon. D. K. Cartter, Chief Judge of the Supreme Court of this District, which was filed by John W. DeKraft, as next friend of said minor children, which arrested the said mandate ordered by the late Circuit Court, and which has been brought officially to the view of this Court.

It is, therefore, ordered and decreed from the foregoing authorities and facts that the direction contained in the mandate above referred to, of the late Circuit Court, to cite Samuel Chase Barney to give bond and security as natural guardian to said minor children, within a reasonable time, is overruled.

*In Re ANDREW HALL.*

1. Whether the Act of Congress of February, 1793, and its supplement the Act of 1850 (the "Fugitive Slave Act"), are in force in this District, *quære*—the Court being divided in opinion.
2. Whether the late Circuit Court of the District of Columbia was one of the class of circuit courts established by Congress under the judicial powers of the Constitution, or was a court erected under that provision which confers upon Congress the right of exclusive legislation over the District is a question discussed in this case but not determined.

Decided May 24, 1868.

*HEARING on habeas corpus.*

The relator, Andrew Hall, was arrested by the marshal of the District, on a warrant issued by Mr. Justice Wyllie, at the instance of George W. Duval, a citizen of Maryland, who claimed him under the fugitive slave law as a fugitive from service. After his arrest Hall procured a writ of *habeas corpus*, and on the answer of the respondent a motion was made to discharge the relator on the ground that the Fugitive Slave Act was not in force in this District, and that the relator's arrest was consequently illegal. The case was heard before the full bench upon this motion.

MESSRS. WALTER S. COX and JOSEPH H. BRADLEY, for relator.

MESSRS. DEAN and JOLLIFFE, for respondent.

MR. CHIEF JUSTICE CARTER delivered his opinion, as follows:

The Court is unable to agree in this case, being equally divided upon the motion to discharge the relator. All the members of the Court have experienced serious embarrassment in regard to this subject. It is my own conviction

that the power heretofore exercised in this District in the matter of fugitive slaves exists at the present time. In arriving at that conclusion I have treated this Court essentially as a Circuit Court of the United States, subject to all the legislation affecting such courts. I have treated it in this light, because taking the intendment of the Legislature, and the experience and precedents of the past as the law of judgment, I believe that in 1801 the Congress of the United States merged this Court in the family of Federal Courts to all intents and for all purposes. And from that time forward this Court, without denomination, became a Circuit Court, and all legislation relating to the Circuit Courts related to this Court.

It seems to me that the evident purpose of the tenth section of the act of 1850 was to arm this Court and the authority of the District, the judges and commissioners with the power and duty to execute this law. I do not intend, however, to elaborate any reason for my opinion, but simply to announce that it appears to me that the history of this legislation, the history of this Court, and the cotemporaneous construction of power by our predecessors, to a large extent affirmed by the Supreme Court, impose upon me the duty of carrying out this law, and whether that duty is a pleasant one or an unpleasant one, as far as I am concerned, is totally immaterial. While I sit here I shall perform my duty whatever may be the consequences. While I am honest in this conviction, two of my brethren are equally honest in the converse of the proposition, and perhaps can furnish better reasons for their opinions than I can for mine. For myself, I confess that my conclusion is the product of a conviction that it is the duty of a judge to carry out the manifest purpose of the law making power, and to seek in legislation his lights to that end, and to see that those purposes are executed. I have no doubt myself that under the Constitution, as far as the fugitive slave law is concerned, it was the purpose to protect those who



claimed ownership in slaves in this District as much as it was anywhere else. I have no doubt that the legislation that has followed had that purpose in view. Being satisfied of that fact, my own judgment would be a refusal to grant the motion. Brother Fisher concurs with me in this judgment, and Brothers Olin and Wylie dissent from it, and they will give their own reasons.

MR. JUSTICE WYLIE said:

The constitutionality of the Act of 1793, and of its supplement of 1850, I regard as settled by the Supreme Court.

The questions which I regard as open for examination are:

1. Whether these acts, or either of them, is applicable to the District of Columbia?

2. If applicable, was the justice who issued the warrant of arrest in this case lawfully authorized to issue it?

If either of these acts is not now in force in this District, or, if the justice of the Supreme Court of this District was not authorized by law to issue the warrant of arrest in this case, the relator must be discharged. If, on the other hand, the warrant was properly and lawfully issued, he must be restored to the claimant.

In Section two, of Article four, of the Constitution, it is declared, "That no person held to service or labor in one State, under the laws thereof, escaping into another shall, in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

As none but the States are members of the Union, and the Constitution only goes into effect upon a people after they are admitted into the Union as a State, this provision of the Constitution was limited (as indeed are all its provisions) to operations between the States alone.

But as Congress and the Executive possess the constitu-

tional power to make laws for and govern the Territories which belong to the Union, but are not yet members of it, the Act of February 12, 1793, entitled "An act respecting fugitives from justice and persons escaping from their masters," in its third section provides "That when a person held to labor in any of the United States, *or in either of the Territories* on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said States or Territory, the person to whom such service or labor may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and take him or her before any judge of the Circuit or District Courts of the United States, residing or living within the State, or before any magistrate of a county, city, or town corporate wherein such seizure shall be made, and upon proof," &c., the claimant shall obtain a certificate to enable him to remove the fugitive to the State or Territory from which he or she fled.

Under this law, if the fugitive was captured in a State the certificate might be given by a judge of either the Circuit or District Court of the United States; but neither of these officers could grant the certificate if the capture was made in a Territory. In that case, the certificate was to be given by some magistrate of a county, city, or town corporate wherein the seizure or arrest was made. The reason for this distinction was that Congress knew there could be no Circuit or District Court of the United States except within the limits of the States embraced by the Constitution and under the Constitution. The system of Circuit and District Courts of the United States had been provided by the judiciary act of 1789, and embraced only the States; that continues to be our system to this day without change, except that the number of the courts of both kinds has been increased with the growth of the country. As yet the District of Columbia had no existence, and the territory which it now embraces was a part of the State of Maryland. But its acquisition had been provided for, and its political con-

dition fixed in advance by section eight of the Constitution, which confers upon Congress the power "to exercise exclusive legislation in all cases whatever over such District (not exceeding ten miles square) as may by cession of particular States and the acceptance of Congress become the seat of Government of the United States."

By Act of 27th February, 1801, the government assumed the possession of and jurisdiction over the territory which had been ceded by the States of Maryland and Virginia respectively for the seat of government. The laws of Maryland, which had been previously in force in that part which was ceded by her, and the laws of Virginia which had been previously in force in that part which was ceded by Virginia, were respectively continued in force. A court was erected in said District of Columbia and consisted of three judges, one denominated the chief judge, and the other two assistant judges, who were to hold their offices during good behavior. And the said court and the judges thereof were invested with all the powers by law vested in the Circuit Courts and the judges of the Circuit Courts of the United States.

This Court also had cognizance of all crimes and offenses committed within the District, and of all cases in law and equity between parties, both or either of whom shall be resident or found within the District, and also of all actions or suits of a civil nature at common law or in equity in which the United States shall be plaintiffs or complainants, and all penalties and forfeitures made, arising, or accruing under the laws of the United States.

The act further provided that this court should continue to take cognizance of all actions, suits, &c., which were then pending respectively in the Hustings Courts of Georgetown and Alexandria wherein the sum in controversy amounted to twenty dollars exclusive of costs.

Finally, all process was to be tested in the name of the chief judge.

Six days after the passage of the above-mentioned act a supplementary act was passed, which conferred upon the court the power to appoint constables, inspectors of tobacco and flour, and surveyor, jurisdiction as to mills, highways, and ferries, &c., and in Alexandria County the same jurisdiction, civil and criminal, as is now (then) possessed and exercised by the District Courts of Virginia.

All these provisions are convincing proof that the Court thus constituted was a local Court of general and universal jurisdiction in all controversies between the citizens of the District and others in civil matters involving the sum of twenty dollars and upwards, and in criminal matters exercising jurisdiction over the most trivial misdemeanors.

It is true that it also possessed the powers and jurisdiction of the Circuit Courts of the United States.

But in passing the Act of 27th February, 1801, Congress seems to have forgotten to provide for the case of fugitives from justice and fugitives from service or labor. The act of 1793 could apply only to States and to the Territories northwest and south of the river Ohio.

The District of Columbia was a new creation, and was neither a *State*, in which it was lawful for a circuit or district judge to examine the case of the fugitive from labor, nor was it one of the *specified Territories*. There was, then, no provision made in the law for this case.

This omission was attempted to be supplied by the sixth section of the Act of 3d March, 1801, in these words:

"That in all cases where the Constitution or laws of the United States provide that criminals and fugitives from justice, or persons held to labor in any State, escaping into another State, shall be delivered up. The Chief Justice of the said District shall be, and he is hereby, empowered and required to cause to be apprehended and delivered up such criminal, fugitive from justice or persons fleeing from service, as the case may be, who shall be found within the District, in the same manner and under the same regula-

tions as the executive authority of the several States are required to do the same; and all executive and judicial officers are hereby required to obey all lawful precepts, or other process, for that purpose, and to be aiding and assisting in such delivery."

This act, then, was the first to introduce into the District of Columbia a law for the recapture of fugitives from crime and fugitives from service. The functions to be exercised by the Chief Justice of the District in the case of fugitives from justice are plain and clear; but in the other case, that of fugitives from service, it most obscure, and nearly, if not quite, unintelligible. In both cases the duty enjoined is required to be performed "*in the same manner and under the same regulations as the executive authority of the several States are required to do the same,*"

The most reasonable and natural interpretation seems to be that reference is made to that provision of the act of 1793, which confers the power upon any magistrate of a city or town corporate wherein the seizure is made, to examine the proofs of claims to the fugitive, and grant certificate, &c.

If the Circuit Court of the District of Columbia be a constitutional Criminal Court of the United States, and the duty thus imposed upon the Chief Justice of this District be simply an executive or ministerial function, this provision of the law is simply void; for, as we shall see hereafter, it has been emphatically and repeatedly decided that Congress possesses no constitutional power to require of the judges of the Federal Courts the performance of duties of an executive character.

But if the Circuit Court of this District was not a constitutional Federal Court, like the Circuit and District Courts of the United States, but a court of general jurisdiction in all matters of controversy in law and equity, a District of Columbia Court, established under that provision of the Constitution which confers upon Congress exclusive juris-

diction over this District in all cases whatsoever, then the result would be different. For by virtue of this general power it was competent for Congress to constitute the Court as it thought proper, without regard to the restriction of the Constitution in respect to Courts of the United States, and might impose even the performance of executive duties upon any of its judges. This subject will be further considered in a subsequent part of this opinion.

It is a remarkable fact that at the time of the passage of this act there was no such officer as a Chief Justice of the District of Columbia.

Nor has there ever been to this day an officer so designated. There was a Chief Judge of the Circuit Court of the District of Columbia; and that officer, assuming, no doubt correctly, that the law was intended to apply to him, continued to perform the duties thereby prescribed from the date of the passage of the law, on the 3d of March, 1801, till the Court was abolished by the recent act establishing the present Supreme Court of the District of Columbia. During that long period of sixty-two years, those duties were performed first by the late Chief Judge Cranch, and after his decease by his successor in office, Judge Dunlop; but, as I am informed by experienced members of the bar of this District, these judges never interfered under this law, except when the fugitive from labor was brought before them by his claimant on *habeas corpus*. And even these cases were few; for slavery being the law of this District, and by both the surrounding States, it was the general practice that the owner of the slave seized him when found, and carried him home without resorting to any process of law for that purpose; and, in so doing, incurred no risk, and was put to but little expense or inconvenience. Assuming that, by fair construction, the sixth section of the Act of 3d of March, 1801, was effectual to introduce the Fugitive Act of 1793 into this District, and impose the obligation of surrendering fugitives from crime and from labor

upon the Chief Judge of the late Criminal Court of this District, we come now to inquire whether, by the Act of 18th of September, 1850, supplementary and amendatory of the Act of 1793, and the Act of 3d of March, 1863, establishing this Court, this power and duty which had been previously exclusively vested (if at all) in the Chief Judge of the Criminal Court of the District of Columbia, were so equally imparted to and enjoined upon the other judges of the late Criminal Court, and their successors, the justices of this Supreme Court.

The act of 1850 consists of ten sections. The first nine sections apply distinctly and exclusively to the States and organized territories of the United States, and have no relation whatever to the District of Columbia.

These nine sections provide a machinery of commissioners for the said States and organized territories for the recapture of fugitives from labor; and these commissioners are to be appointed *in the States*, by the Criminal Court of the United States, and *in the territories* by the several superior courts thereof.

And it is provided that these commissioners—that is to say, the commissioners appointed by the Circuit Court of the United States within the several States, and the commissioners appointed by the superior courts within the several organized territories—“shall have concurrent jurisdiction with the judges of the circuit and district courts of the United States, in their respective circuits and districts, *within the several States*, and the judges of the superior courts of the territories, severally and collectively, in term, time and vacation.”

This language leaves no room for any difference of opinion as to what courts and judges and what commissioners are authorized to act under the law. There is no reference in the remotest manner to either courts, judges or commissioners in the District of Columbia. On the contrary, the language appears to have been carefully selected to exclude them all.

Let us now consider the tenth and last section of the law—the only section which relates to this District, or in which it is named. The section is longer than I care to quote, but is in substance as follows:

That when any person held to service or labor in any State or territory, or in the District of Columbia, shall escape therefrom, the party claiming the service of the fugitive may have a record made in the place from which the escape was made, proving his right to the fugitive, and taking with him a transcript of this record, and on the same being produced “in any other State, territory or district in which the person so escaping may be found, and being exhibited to any judge, commissioner or other officer *authorized by the law of the United States to cause persons escaping from service or labor to be delivered up*,” this record shall be held and taken to be full and conclusive evidence to establish the owner’s claim.

“And the said Court, commissioner, judge, or other person authorized by this act to grant certificates to claimants of fugitives,” shall thereupon grant a certificate to the claimant, to enable him to seize and arrest the fugitive and transport him to the State or Territory from which he escaped.

If it were clear that the previous nine sections of this act conferred no power upon the judges of the Circuit Court of this District, either to act themselves, or to appoint commissioners to act, under their provisions it is equally clear that no new power was conferred in these respects by the tenth section. The record is to be carried by the claimant to some judge, commissioner, or other officer *authorized by law* to investigate the subject and give a certificate. If reference is here made to the officers provided for this purpose, in the nine previous sections of the act, there is not one of them an officer or magistrate in this District; they are only the judges of United States Courts within the States, and commissioners within the States or organized Territories.



Nor is this argument in the slightest degree weakened by the next following sentence, except one, in the same section, which is as follows:

"And the said Court, commissioner, or judge, or other person authorized by *this act* to grant certificates to claimants of fugitives shall, upon the production of the record and other evidences aforesaid, grant to such claimants a certificate," &c.

This sentence, without any distortion or strained construction, especially when taken in connection with the first sentence of the section, might be construed to mean that no judge or other officer, except those previously provided in the act, should have the power to examine the claims or grant certificates. If that were the reading, then no fugitive cases could be examined, except in the States by the United States judges, and in the Territories by commissioners; so that this tenth section, so far as it concern this District, would then be construed to apply only to cases of fugitives who had escaped from the District, and not to cases where fugitives had escaped to it.

But it has been argued with great earnestness and apparent sincerity, that the late Circuit Court of this District was included in the terms of the act of 1850, as one of the Criminal Courts of the United States. And indeed the exigency of the occasion requires that this position be maintained, else has this Court nor its judges any jurisdiction under the act of 1850, either to act themselves, or appoint commissioners with authority to act under this law.

In my opinion, the late Criminal Court of this District was not one of the class of Criminal Courts of the United States. But I will not at present argue that subject; but will admit, for the sake of the argument, that it was one of that class of Courts. It is, nevertheless, not embraced by the act of 1850. That act, as has been already shown, is confined to the several Courts and District Courts of the United States *within the States*. This is manifest from the

language of the fourth section: "That the commissioners above named shall have concurrent jurisdiction with the judges of the Circuit and District Courts of the United States, in their respective circuits and districts *within* the several States, and the judges of the Superior Courts of the Territories, severally and collectively, in term time and vacation."

No other Circuit Courts of the United States, therefore, are within the meaning of this act, except only such whose judges exercise their jurisdiction "*within the several States.*" So that, if the late Circuit Court of the District was indeed and truly a Circuit Court of the United States, that fact would make no manner of difference as to the subject under examination. But was the late Circuit Court of the District of Columbia one of the class of Circuit Courts of the United States, established by Congress under the judicial powers of the Constitution; or was it a Court of a different character, erected under that power in the Constitution which confers upon Congress the right of exclusive legislation over the District of Columbia?

It is very probable that but for the similarity of names, this question would never have been made. And yet even the names are not the same. There were about as much propriety in maintaining that the Supreme Court of the District of Columbia is a Supreme Court of the United States, as for arguing that the Circuit Court of the District of Columbia was a Circuit Court of the United States.

It is quite true that Congress by the act of 27th of February, 1801, invested the Court with all the powers, and also with all the jurisdiction then possessed by the Circuit Courts of the United States. But at the same time it conferred upon the Court jurisdiction over all the controversies which might arise between our own citizens; inhabitants of the same district, over subjects of even the value of \$20, over appeals from the Orphans' Court, even over many matters such as the appointment of constables, inspectors of flour

and tobacco, and in general, all the powers and jurisdiction which were possessed by the courts of Maryland and Virginia.

Now it must be manifest that no court established under the judicial provisions of the Constitution, as are the Circuit Courts of the United States, is capable of receiving any such jurisdiction as that I have referred to. The correct doctrine is laid down by Chief Justice Taney, in the case of *Dred Scott vs. Sanford*, 19th How., at page 401, as follows: "This difference arises, as we have said, from the peculiar character of the Government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it, and neither the legislative, executive, nor judicial departments of the government can lawfully exercise any authority beyond the limits marked out in the Constitution."

And in regulating the judicial department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; *and they are not authorized to take cognizance of any case which does not come within the description therein specified.*

A Circuit Court of the United States is, therefore, not competent to exercise jurisdiction over any parties or subject of controversy, unless they are specifically included in the class enumerated in the 3d Article of the Constitution.

But the cases arising under that branch of its jurisdiction compose but a small proportion of the business which is brought before the Court of this District. Either all this vast amount of business over which this Court has exercised jurisdiction for more than sixty years, and mainly for the accommodation of which the Court was enacted, has been transacted in the Circuit Court of the United States, which possessed no constitutional cognizance of it at all,

and whose judgments and decrees are, therefore, in all these cases void; or, the other branch of the alternative is true, namely: that our Circuit Court is a Court for the District of Columbia, and its jurisdiction is supplied and is sustained from that provision which confers upon Congress the right of exclusive legislation over the District of Columbia.

These principles are plainly assumed, although the precise question was not decided in the case of *American Insurance Company vs. Canter*, 1 Peters, 511, and in *Kendall vs. The United States*, 12 *Ib.*, 524.

In this last case, the facts, so far as they are important in this question, were these: On the 13th day of February, 1801, Congress passed a law for a new organization of the circuit courts of the United States, and conferring the power on these courts of issuing the writ of *mandamus* in certain cases—a power which these courts did not previously possess. On the 27th of February, 1801, the act was passed erecting the Circuit Court of the District, and vesting it with all the powers and jurisdiction possessed by the circuit courts of the United States, including, therefore, the power to issue the writ of *mandamus*. The new organization lasted but little more than a year, and the Act of 13th February, 1801, was repealed by the Act of March 8, 1802. The effect of this renewal was to revive the old law which was in force prior to 13th February, 1801, the act of 1789. But this act did not confer upon the circuit courts the power to issue the writ of *mandamus*. Thus the power which these courts gained by the Act of 13th February, 1801, they lost by its repeal. But the Court decided, in this case, that the Circuit Court of the District of Columbia still possessed the power to issue the writ, and its jurisdiction, in this respect, was unaffected by the passage of the act which deprived the circuit courts of the United States of that power.

This opinion is already drawn to greater length than I

intended it should be; but its length is not incommensurate with the importance of the questions discussed, or of their interest to the profession and the country. I have not stopped to meet and discuss a number of questions of secondary consequence, knowing that they were but secondary and would stand or fall with the fate of those of primary importance. These, although only partially discussed, yet I presume, have been examined sufficiently to show that the conclusions reached are unquestionably the law.

If the sixth section of the Act of March 3, 1801, was at all obligatory upon the Chief Judge of the late Circuit Court, as the person designated as Chief Justice of the District of Columbia, to execute the law, yet it did not confer any such power on his associate judges; nor have the justices of this Court, other than the Chief Justice, any power or authority under that law. In my judgment, the relator is unlawfully detained, and ought to be discharged.

MR. JUSTICE FISHER said:

I was not present last week when my brethren announced their opinion\* as to the first question involved in this case. I refer to the question as to the constitutionality of the several acts of Congress providing for the recapture and delivery of fugitive slaves. I, therefore, avail myself of this occasion to declare my entire concurrence in the opinion then expressed, that whatever might be the views of this Court upon that subject were it a new question, we are bound to acknowledge the decisions of the highest judicial tribunal of the Republic as the supreme law of the land.

The Supreme Court of the United States has more than once passed upon that question, and it only remains for inferior tribunals to accept the law as it is thus declared. "*Stare decisis*" is a maxim of the law as salutary as it is ancient, and should never be disregarded except in cases where

---

\*These opinions were oral, and, consequently, have not been preserved.

the safety of the State or clear and pressing public necessity demands a departure from its guidance.

I concur with Chief Justice Cartter in the opinion just expressed upon the questions presented in the argument of this cause. In giving construction to the several acts of Congress enacted for the purpose of aiding in the execution of that clause in the Constitution which requires the extradition of slaves escaping from one State into another we are to regard those acts being *pari materia* as one act; and we are also, in making inquest for the meaning of the acts, to be governed by what appears to be the purpose of the legislature. Taking then, all these enactments together, I cannot understand how any man can fail to perceive in them a manifest purpose on the part of Congress, not only to provide for the return of a slave escaping from one State into another State, but to provide for the return of a slave escaping from this District into a State or a Territory, or another district; and further, for the return of a slave escaping from a State, a Territory or another district, *into* this District. The District of Columbia is by no means "*casus omissus*" in the statute. The tenth section of the Act of 1850, if we were to look no further, expressly declares "that when any person held to service or labor in any State or Territory, or in the District of Columbia, shall escape therefrom, the party to whom such service or labor shall be due, his, her, or their agent or attorney may apply to any Court of record therein, or judge thereof, in vacation, and make satisfactory proof to said Court, or judge in vacation, of the escape aforesaid, and that the person escaping owed service or labor to such party; whereupon the Court shall cause a record to be made of the matters so proved, and also a general description of the person so escaping with such convenient certainty as may be, and a transcript of such record, authenticated by the attestation of the clerk and of the seal of the said Court, being produced *in* any other State, Territory, or *district* in which the person so escaping may be, and

being exhibited to any judge, commissioner, or other officer authorized by the law of the United States to cause persons escaping from service or labor to be delivered up, shall be held and taken to be full and conclusive evidence of the fact of the escape, and that the service or labor of the person escaping is due to the party in such record mentioned; and upon the production by the said party of other and further evidence, if necessary either oral or by affidavit, in addition to what is contained in said record of the identity of the person escaping, he or she shall be delivered up to the claimant."

In order to free the section from confusion, and the more readily and clearly to get at the meaning of its provisions, let us leave out all occurring after the word "State," in the second line, down to the word "Court," inclusive, in the twelfth line, and let us substitute for the words thus omitted other words more briefly expressive of the same idea. We may do so without in anywise changing the sense or affecting the question under consideration, while we shall bring in close juxtaposition the first line and a half with that portion of the section beginning with the twelfth line. We then have the section to read as follows:

"That when any person held to service or labor in any State shall escape therefrom, the claimant of the fugitive may make record proof of his claim in any Court in his own State; and a transcript of such record being produced in any other State, Territory or *district* in which the person so escaping may be found, and being exhibited to any judge, commissioner or other officer authorized by the law of the United States to cause persons escaping from service or labor to be delivered up, shall be held as full and conclusive evidence of the escape," &c.

The section there provides for the delivery of the fugitive to his master. Is Maryland then a State? Was the relator a person held to service or labor in that State? Has he escaped from that State? Is the District of Columbia a

district? And has the relator been found in this District? These questions, answered affirmatively, as they must be, leave no room to doubt of the application of the act of 1850 in this case. To my mind, it seems that words could not possibly be used more expressly indicative of the manifest intention of Congress to provide for the return of fugitives from a State, escaping into and found in this District, than those which they did use. The language could not have been more significant of their intention if they had declared in so many words that a slave escaping from Maryland, and found in the District of Columbia, should be liable to arrest and delivery, as provided for in the preceding sections of the chapter. It will not do, as an escape from the plain meaning of the words used in the tenth section, to say that the word "other," used in the twelfth line of that section, refers back to the words "District of Columbia," in the second line, so as to make an arrest and delivery in some other District than that of Columbia lawful; for such a construction would take away the right of recaption when the slave should escape from a State into any other place than *another State*, or from a Territory into any other place than *another Territory*, or from the District of Columbia into any other place than the District of Columbia (there being no other district at present within the limits of the Federal Government). So strained a construction would attribute to Congress a ridiculous absurdity, while the plain and natural construction which I give to the language of the section, makes sensible provision for the remedying of that which the Congress of 1850 deemed to be a defect in the pre-existing law on the subject. Entertaining this view, I am forced to the conclusion that the Fugitive Slave Law is applicable to the District of Columbia, as well in respect to slaves escaping *into* it from other States, Territories or districts where they may be lawfully held in slavery, as in respect to slaves escaping *from* this District into other States, Territories or districts prior to the passage of the Act



of April 16, 1862, emancipating the slaves within the limits of the District of Columbia.

The only question then remaining is as to whether there is any power vested in this Court, or the judges thereof, to execute the Fugitive Slave Act with respect to slaves escaping into this District; and the solution of this question depends upon the fact as to whether this Court, by the act authorizing it, has had conferred upon it the powers which belong to the Circuit Courts of the United States. In other words, does this Court belong to, and is it included in the family of Circuit Courts of the United States?

By the act organizing this tribunal, the Supreme Court of the District of Columbia has been clothed with all the powers and duties of the Circuit Court originally created by Congress for this District. This last Court was a creature of the Government of the United States, and not of any State government, and was styled a "Circuit Court." It was invested with all the potentiality and even more ample power than the Circuit Courts of the United States within the several States. How, then, could it have been other than a United States Circuit Court?

But besides this we have the construction of the legislative, executive and judicial departments of the Government, all regarding the old Circuit Courts of this District as a United States Circuit Court. The rules made by the Supreme Court of the United States, to be observed by Circuit Courts of the United States, have been held by the Supreme Court to be applicable to the old Circuit Court of this District. Congress has passed enactments taking it for granted that it was a Circuit Court of the United States, and the Executive Departments have since its creation regarded it as in the category of United States Circuit Courts. Such recognitions would, even if there was a doubt about the question in the beginning, entitle it, after a lapse of half a century, to be considered as set at rest.

It is to the Circuit Courts of the United States, the judges

and commissioners thereof, upon whom is devolved the duty of executing the provisions of the Fugitive Slave Law of 1850.

I am clear, therefore, in my conviction—

*First.* That this Court is bound to accept the decisions of the Supreme Court of the United States declaring the Fugitive Slave Acts to be constitutional.

*Second.* That said acts being constitutional, are applicable to the District of Columbia, as well as to the States and Territories, so far as respects the recaption of slaves escaping from States when they are lawfully held as slaves; and—

*Third.* That this Court or any of its judges or commissioners are empowered to execute the Fugitive Slave Law of 1850.

As a consequence, I am of opinion that the relator ought to be remanded to the custody of the marshal, that the claimant may have a hearing of his claim before Judge Wylie, who issued the writ for the relator's arrest.

MR. JUSTICE OLIN said:

I greatly regret finding myself compelled, on a somewhat hasty examination of this question, to dissent from the opinions expressed by the Chief Justice and Associate Justice Fisher.

Up to and including 1850, there were but three acts of Congress passed in reference to the subject of the rendition of fugitive slaves. First, the act of 1793; second, the act of 1801, in reference to the Chief Judge of this District, and third, the law known as the Fugitive Slave Act. I am unable to discover that the provisions of either of these acts, except the act of 1801, refer to this District, or empower any officer, except it may be a justice of the peace, to execute its duty. The act of 1793 does not by its terms refer to the District, but, on the contrary, by its express language, the exercise of the authority conferred is limited

and confined to the rendition of slaves who escape from one State to another, or Territories northwest and south of the Ohio River. That act conferred powers on the Circuit and District Courts of the United States, and on the judges of those courts, and some other persons assumed to be State officers, whom it is not necessary to mention in this connection; and as it could not be held that that power had been conferred here by any other act, it is only necessary to see if this District was intended to be included within the terms of its provisions.

In construing this statute I confess that I have adopted the rule that unless the power is plainly given and jurisdiction expressly conferred, the Court has no right to take it by implication. It is the duty of the Court to construe this statute strictly (it being in derogation of natural rights), and if the power is not plainly given it is not the duty of the Court to devise by ingenious modes of construction a means to the exercise of that power. I think it can hardly be assumed, therefore, that the act of 1793, by the mere designation of the judges of the District and Circuit Courts of the United States (tribunals well understood and defined at that time and up to the present hour), conferred the like authority to the judges of this District as was granted to those courts. I infer this from the act of Congress very soon thereafter passed, and about as soon as Congress assumed jurisdiction over and the government of this District, viz, the act conferring authority upon the Chief Judge of the then Circuit Court. I see no propriety—no reason for the passage of that act, unless it is to be taken as a legislative expression that up to that time the authority did not exist; for it would be an idle exercise of power if the authority to restore fugitive slaves from the District were already vested, not only in the Chief Judge, but in both of his associates. I infer that Congress thought there was no authority, no person designated for the exercise of that power, and consequently passed the act of 1801, conferring

the power upon persons in this District to exercise the office.

Thus the law stood until 1850. In the meantime a variety of commissioners had been appointed, not only by the District, but by the Circuit Courts of the United States; the power to appoint them was vested either in the District or in the Circuit Courts of the United States. And as I understood it, the language referring to that system of judicial courts established under the Constitution and extending their jurisdiction over the State is explicit and definite, and properly designated those courts, and in my judgment, should be restricted in its operation to those courts.

By the Fugitive Slave Law of 1850, the power to restore all these fugitive slaves was conferred upon these commissioners, and it is unnecessary to inquire here whether this court had or had not the power to appoint commissioners, and whether those commissioners, when appointed, may not exercise the jurisdiction which it is claimed here the judge ought to exercise in this case. I will give no opinion on that question, as I have not sufficiently examined it, and as it does not necessarily arise in this case. The question here is simply "whether the judge who issued this warrant of arrest had power to do so under the laws of Congress in reference to the rendition of fugitive slaves."

It is sought to discover this power in the act of 1850. After the most patient examination of it within the limited time I have had to devote to it, I am unable to discover any authority in the act of 1850 conferring any power upon the judge of this District, either of the present court or the court which went out of existence upon the institution of the present one.

I wish to call attention in this connection to the fourth section of the Fugitive Slave Law of 1850, which is as follows:

"The commissioners above named shall have concurrent jurisdiction with the judge of the Circuit and District Courts

of the United States, in their respective circuits and districts within the several States, and the judge of the Superior Court of the Territories, [as before spoken of as the organized territory] severally and collectively in term time and vacation, and shall grant certificates to such claimants upon satisfactory proof being made," &c.

That phrase, "grant certificates," is expressive when taken in connection with the tenth section of the act under which it is sought to confer the power upon this Court.

Without reading the whole of the tenth section, I will endeavor to state the substance of it so as to make myself understood. The tenth section provides, in the first place, that whenever a fugitive slave escapes, from this District for example, the claimant may apply to any Court of record in this District, or any judge thereof, and make up what is called the record of escape, which shall contain three things:

First, the fact that the slave has escaped out of the District without the consent of his master.

Second, that such a slave owes service to the claimant, and—

Third, such other facts as shall tend to prove the identity of the slave claimed as the person owing service to the claimant.

And on this third branch, this record is open to dispute and denial or controversy only before the person or Court to whom the claimant appealed for the service mentioned in the fourth section of the act. The claimant need not go to a Federal Court; he may go to any State Court, any Court of record, to get that record made up. To whom may he produce the record? The law says he may produce it to the person authorized by the law of the United States to render these slaves up. Who are those persons? By the Act of 1793, and by this act, they are commissioners appointed by the Circuit or District Courts of the United States or the judge of such a Circuit or District Court, or that Court;

and they are to render up the person if he be arrested and brought before such a tribunal as that.

The statute further goes on to say: "Where the proofs are defective as to the identity of the slave, he may furnish oral proof to supply that defect, and instead of the record he might seize the person and bring him before the person authorized to render up fugitive slaves." And the section further proceeds to say: "And the said Court, commissioners, judges, or other persons authorized by this act to grant certificates to claimants of fugitives owing service or labor as aforesaid, shall make certificate." Who are those persons authorized of this act to make certificate? They are the judges of the Circuit and District Courts of the United States, and the commissioners appointed by such Courts. The whole question then is whether the language here made use of in speaking of the judges of the District and Circuit Courts of the United States by its terms includes the judges of this District and the District or Circuit Court of this District?

I may remark in this connection, that the terms of the Act of 1801 which conferred upon the chief judge of this District the authority to render up fugitives from service and labor, when the act creating this Court abolished that Court, and with it the office of judge of the Circuit Court, and the person holding that position went out of office as he did by the act referred to; that power, whatever it was, which was conferred upon the chief judge of that Court, was not transmitted to this Court nor to the chief justice of this Court because the designation of one of the judges of this Court as chief justice or presiding judge carried with it no other authority in law, in my judgment, than that of presiding in the Court when the Court is assembled as a Court. It is the designation modified somewhat in form, known to the organization of Courts since the history of the common law, and it never was, unless some power was conferred by statute, incident to the power of chief justice. The simple

designation of the presiding judge or chief justice, confers upon that dignitary no judicial power above that conferred upon his brethren. It simply authorizes him to preside at General Term when the Court meets.

Therefore, I think that the power conferred by the act of 1801 was repealed by the act of Congress which abolished the court and the officer upon whom the power was conferred. It will be seen, then, that the only question is whether the general legislation of Congress affecting what is known as the Circuit and District Courts—that general judiciary system extending all over the United States, naming those courts by their then proper designation, applies to this court? I do not doubt it does, although this court may possess, and I will concede, for the sake of the argument, it does possess all the power and jurisdiction of the various Circuit Courts of the United States by the act creating it, possesses all the powers that they then possessed, but even then I do not think it follows, by any means, that because this Court possessed all those powers it is identical with those courts, and that all the general legislation affecting those courts applies to this Court. It is quite manifest that the courts are quite distinct and of entirely different jurisdiction and power. For instance, the Court of this District, the late District Court not only possessed the powers that were originally given to the circuit courts of the United States, but it possessed, too, all those powers that were usually exercised by a court of equity—a court of law of the respective States—and it would be most extraordinary, if a court possessed of such powers should always be affected by legislation applicable only to the District and Circuit Courts proper of the United States. It seems to me manifest that that is not so. The case of *Kendal*, in 12th Peters, which has been cited in the argument clearly shows that the powers of this Court, as a Circuit Court, are different from the powers of a Federal Circuit Court, because the Court has repeatedly denied the

exercise of the authority of the Federal Courts to grant a writ of *mandamus*; but a majority of the Court sustained the view of the question, that this Court had the power to do it, and it derived this power, not from the general powers and authorities conferred upon the Circuit Courts of the United States, but from the laws of Maryland and the act of 1801, which was not repealed by the subsequent legislation affecting the organization of this Court.

I come to the conclusion, therefore, with entire willingness to execute every duty imposed upon me by law, as I am enabled to understand it by the best lights that are spread before me, that there is by the repeal of the act of 1801, or rather by the abolition of the Court that then existed, since 1801, up to the last session of Congress no power in this District, no judge in this District, except it be a justice of the peace, or some other officer, created here by some local authority, that may exercise this power. Perhaps the judge who issued the warrant may, if he sees proper to do so, voluntarily assume to exercise this power, though I can find no language in any statute of Congress authorizing him to do so, for he is not one of the officers named in the act of 1793. But it is possible that where Congress has conferred the power upon the State officers, if he is willing to exercise that authority he may do so. But I do not consider that question at all. I am only inquiring, in whom has the law reposed this duty when called upon to act in such a case as the present, and I have come to the conclusion that the judge who issued the warrant of arrest was not one of those officers, under the law of Congress, upon whom that duty had been imposed.



## UNITED STATES

*vs.*

## THE SCHOONER SALLY MEARS.

1. By reason of its ordinance of secession and its joining the fortunes of the Confederate States, every inhabitant of the State of Virginia became, *ipso facto*, under the laws of war a public enemy of the United States, and his property enemy property, although he may have openly denounced the ordinance of secession and acknowledged his paramount allegiance to the United States.
2. Two days before the passage of the ordinance of secession by the State of Virginia, a vessel cleared from Norfolk of that State for the Barbadoes. She was owned in Virginia, and her officers and crew were inhabitants of that State. On her return voyage she was destined for Baltimore, but was captured by a United States man-of-war twelve miles outside the capes of the Chesapeake. Her papers were regular, and she sailed under the United States flag. Her master, who was owner of one-eighth of the vessel, testified that he considered himself a "subject" of the United States; that he considered his allegiance to the Union as greater and stronger than the allegiance he owed to his native State, and that he would sustain the United States against his native State. *Held*, That the vessel at the time of her capture was enemy property in consequence of the residence of her owners in the enemy country.

In Admiralty No. 17. Special Term. Decided January 5, 1864.

LIBEL by the United States and the officers and crew of the United States steamer *Quaker City* against the schooner *Sally Mears*, captured on the high seas and claimed as prize.

THE FACTS are stated in the opinion.

MR. E. C. CARRINGTON, District Attorney, for libellants.

MR. JAMES M. CARLISLE, for libellee.

MR. JUSTICE WYLIE delivered the opinion of the Court:

This vessel and her cargo were captured on the 1st day of July, 1861, about twelve miles outside the capes of the Chesapeake, in the Atlantic Ocean, by the United States

steamer *Quaker City* and sent to this District and libelled as prize of war.

The *Sally Mears* was owned in Matthews County, Virginia, and all the officers and crew of the vessel were inhabitants of that county. George Richardson, the master, was the owner of an interest of one-eighth, and the remaining interests were all owned by citizens of the same county. The crew was shipped on the 12th of April, 1861, and the schooner sailed from Norfolk on or about the 15th of the same month with a cargo of staves for Barbadoes. At the time of her capture she was on her return voyage destined for Baltimore, and in ballast. Her papers were all regular, and she sailed under the United States flag.

The master states in his examination that he considered himself a subject of the United States; that he had always been a subject of the United States; that he considered his allegiance to the Union as greater and stronger than the allegiance he owed to his native State, and that he would sustain the United States against his native State.

At the time of the capture the mouth of the Chesapeake was blockaded by the armed ships of the United States, but the master of the *Sally Mears* had not previously heard of its existence, or of the President's proclamation on that subject.

The Convention at Richmond had passed the Ordinance of Secession on the 17th of April, only two days after the schooner had sailed from Norfolk; and this ordinance had been ratified by a vote of the people of that State on the 24th day of May following. And these acts were preceded and followed by deeds of open and flagrant war against the Government of the United States, in which Virginia made herself a party.

There is no evidence to show that this vessel made any attempt to violate the blockade; nor that the owners, the master or the crew, individually, had taken any part in the hostilities which had so recently commenced, or had any

sympathies with the cause of rebellion. On the contrary, the master of the schooner, in manly words, has proclaimed his adherence to the cause of the Union.

The Court would be happy to relieve the claimant in this case if it could be done consistently with great and settled principles of public law, before whose supremacy all questions of discrimination in favor of individuals must be made to yield.

The laws of war may appear harsh and oppressive in particular cases, when applied to those whose consciences are void of guilt for its inception, or for participation in its conduct; but it should be remembered that peace, permanent and speedy, can be reached only by means of their stern and unflinching enforcement.

Were war to be carried on in any other way it would soon languish into effeminacy, the virtue and manliness of the people would fail, intestine quarrels and contentions would be encouraged, government would be undermined, and hostilities though languishing for want of vigor, would become interminable.

If then it were given us to choose, the court could not hesitate to apply the rules of the *jus belli*, even in a case where it saw the application would produce hardship to individuals, rather than extend its sympathy and relief at the expense of a manifestly wise though vigorous policy.

From the date of the accession of Virginia to the cause of the rebellion in April, 1861, she was engaged in civil war against the Government of the United States. The President by proclamation declared the fact, and called upon the military and naval forces of the country to meet the emergency. From that date the laws of the Union ceased to be acknowledged, its courts were closed, and its officers of justice had resigned their places or were powerless to perform their duties.

Armies of great magnitude were raised on both sides, and on the side of the South, including the State of Virginia, a

new government, calling itself the Confederate States of America, was organized and put into operation throughout the extent of an immense territory.

This was unquestionably civil war, and no longer a mere insurrection. If so, its results must be those which follow in other wars.

One of these results is that the inhabitants of each section have become enemies of those of the other without regard to their individual opinions, principles or feelings. The citizen of Virginia whose vessel is found upon the high seas, is an enemy so far as the fate of his vessel is concerned, although he may openly deny the validity of the ordinance of secession, and denounce the wickedness which has carried his State into the war against the government, to which he acknowledges a paramount allegiance.

He is an enemy by reason of his residence in the enemy country, and will remain such so long as his residence continues unchanged.

This doctrine is clearly stated and its policy ably vindicated in the case of *The Venus*, 8 Cranch, 253, and in the opinion of Sir William Scott, in *The Indian Chief*, 3 Robinson's Rep. It has also received the sanction of my predecessor, Chief Judge Dunlop, of the late Circuit Court of this District, in an elaborate opinion delivered in the case of the *United States vs. The Tropic Wind*;\* and also of Judge Cadwalader of the District Court of the Eastern District of Pennsylvania, in the case of *General Parkhill*.

The *Sally Mears* was therefore at the time of her capture enemy property, made so in consequence of the residence of her owners in the enemy country, and must be condemned to the captors as lawful prize of war.

---

\*See this case in the appendix.

JOHN B. ADAMS

vs

CHAUNCEY A. HERR.

- 
1. On *certiorari* to review a proceeding under the Statute of 8th Henry VI, ch. 9, for forcible entry and detainer, if the complaint and finding of the inquest show that the complainant held only a leasehold and the latter declare that the defendant "did disseise and expel" with strong hand, &c., such finding is incurably repugnant, for there can be no disseisin of a leasehold.
  2. So it is a fatal error if the record does not show that all the members of the inquest were sworn.
  3. And such swearing ought to be shown by a certificate of the justices and not be left to be certified by the members of the inquest.
  4. So, too, it will be fatal if the record does not show that the defendant was called, or had notice of the finding of the inquest that he might have the opportunity to tender his traverse.
  5. The course of procedure under the Statutes of Henry VI and James I, relating to forcible entry and detainer, pointed out and explained by the Court.

At Law. No. 869. Decided February 27, 1864.

*Certiorari* to review proceedings of justices of the peace in a case of forcible entry and detainer. Heard in the General Term in the first instance. The facts are sufficiently stated in the opinion.

MR. M. THOMPSON, for complainant.

MESSRS. BRADLEY and STONE, for defendant.

MR. JUSTICE WYLIE delivered the opinion of the Court:

This case is before the Court on *certiorari* to Justices Bates and Kinsey, and is to be decided on the face of the record.

The proceedings before justices originated on the written complaint of Adams that he had been forcibly ejected from and by force kept out of certain premises in the City of Washington by the said Chauncey A. Herr. The premises described are two rooms in the house No. 450 on lots 2 and 4, in square 488, of which the complainant avers the said

Adams, at the time of the forcible entry, was "seised in his demesne as of leasehold and tenant for years."

The complaint being made, the justices caused an inquisition to be held to make inquiry as to the force, and the finding of this jury is before us as part of the record in the case.

No further proceedings were taken by the justices in consequence of the services of the *certiorari*, which had the effect to bring the record into this Court.

The proceedings in question were instituted under the following provisions of the Statute 8th Henry VI, ch. 9; "and, moreover, though that such persons making such entry be present or else departed before the coming of the said justices or justice, nevertheless the same justices or justice in some good town next to the tenements so entered or in some other convenient place, according to their discretion, shall have, or either of them shall have, authority and power to inquire by people of the same county, as well as them that make such forcible entries into lands and tenements as of them which the same hold with force; and if it be found before any of them that any doth contrary to the statute, then the said justices or justice shall cause the lands and tenements so entered or holden as aforesaid to be resealed, and shall put the party so put out in full possession of the same lands and tenements, so as aforesaid entered or holden."

Inasmuch as the statute declared that the party put out by force should be "resealed" by the justices, the Courts decided that the terms *seisin* and *disseisin* and *reseise* could be properly used only in reference to tenants of the freehold.

For cure of this defect the Statute 21, James I, ch. 15, extended the remedy in favor of tenants for years, and of other estates less than freehold therein enumerated, not, however, including tenants at will or sufferance.

The object of these statutes was to furnish a means where-

by a person who had been forcibly put out of possession of lands or tenements, or unlawfully and by force kept out, might obtain a speedy and complete remedy, by restitution of the possession of which he had been deprived by force.

But as the remedy provided was statutory and summary, and the jurisdiction of the justices of the peace, special and limited, the courts have held, from the beginning, that the directions of the statutes must be strictly followed.

The record in this case discloses several errors which are fatal to the proceedings.

The first is that both the complaint and the finding of the inquest aver that at the time of the alleged forcible entry, the said "Adams was seised in his demesne as of leasehold and tenant for years," and the latter declares that the said Horr "did disseise and expell" with strong hand the said Adams from the premises so held.

This is an incurable repugnancy, for Adams had claimed and the jury had found only a leasehold for years in Adams, and of that there could be no disseisin. See 1 Hawk., P. C. ch. 28, sect. 39, and authorities cited.

2d. The record does not show that all the members of the inquest were sworn. The inquisition, it is true, is signed by the whole twenty-three, but in the body of the inquisition it appears that only twenty-two of them were sworn. This is also a fatal defect. Besides, it ought to have been shown by a certificate of the justices themselves that the oath had been administered to the inquest, and that fact should not have been left to be certified by the inquest themselves.

3d. It does not appear in the record that the defendant was called, or had notice of the finding of the inquest, that he might have the opportunity to tender his traverse, if he thought proper. In *Queen vs. Winter*, Cro. Jac. 324, Holl, C. J., said, "that if the party against whom the inquisition was found would traverse the force, that was always a reason to stay execution; and that it had been held a superse-

deas to the awarding it, and all inquisitions of office are, of common right, traversable. And if in case of an inquisition of forcible entry taken before a justice of the peace, the defendant tenders his traverse immediately, the justice must adjourn to another day and award process to return a jury thereof. In Sir Richard Bray's case an inquisition found a forcible entry, and the defendant offered immediately before the justice to traverse the force. The justice refused the traverse and granted restitution, but Kelyng, C. J., granted re-restitution."

In the present case the inquisition rendered their finding on the 1st of February and the certiorari was not served till the 4th. All the authorities say that if the defendant be not present at the time of the finding he must be called, that he may be afforded an opportunity to traverse their findings.

The record in this case does not show whether the defendant was or was not present when the finding was rendered, nor whether he was called. This also is a fatal defect.

Having thus disposed of the several questions arising on the record in this case, I proceed to state the impressions of the Court on one or two points connected with proceedings of this character, which may be of use in other cases hereafter.

And first, we advise that in all proceedings under the landlord and tenant law of 1793, as well as under statutes of Henry VI and James I, relating to forcible entry and detainer, they be conducted under the supervision of the justices, who are to determine all questions of law for the inquisition as well as those relating to evidence as others; and that the justices make a record of the whole proceedings, similar to the records kept by the clerks of courts of record.

Second. That in proceedings to obtain restitution, in cases of forcible entry and detainer, the inquisition may proceed



*ex parte*, or may hear witnesses on both sides, in their discretion. But that, if the defendant be not present when the finding is rendered, by the inquisition, the justice or justices holding the same should have the defendant served with notice of the finding, which notice may be served as other notices are served in proceedings before justices of the peace; and unless he appear, in person or by attorney, within three days from the service of such notice, and traverse the force in writing, the justice or justices may treat it as a waiver of the traverse, and render judgment upon the finding of the inquisition. But should the defendant appear and traverse the force, the justices should then issue a venire for a petit jury to try the issue before them, at such time as may be just and reasonable for both parties, under the circumstances.

All these proceedings require great care and particularity, are cumbrous, expensive, and uncertain. But they are the only remedies we have, or have been able to get, for the evils to which they apply, and we must endeavor to make the best of them until such time as better can be obtained.

JOHN B. ADAMS

vs.

CHAUNCEY A. HERR ET AL.

- 
1. At common law one having the right of entry upon lands could lawfully take and retain possession thereof by force provided he used no more force than was necessary to effect his purpose.
  2. In a criminal proceeding under the acts of 5th. and 15th Rich. II, for forcible entry and detainer the complaint must be in writing, under oath and must be certain as to the facts, circumstances and intent constituting the offense. If it be vague and uncertain in its description of the place, or fail to allege the expulsion of the complainant from the premises it will be quashed.

Decided February 27, 1884.

*Certiorari* to review proceedings of Justices of the Peace in a complaint, under the statutes of 5th and 15th Rich. II, for forcible entry and detainer. Heard in the General Term in the first instance.

The FACTS are sufficiently stated in the opinion.

MR. M. THOMPSON for plaintiff.

MESSRS. BRADLEY and STONE for defendant.

MR. JUSTICE FISHER delivered the opinion of the Court:

This is a proceeding, not for the purpose of restoring to the relator the property of which he claims to have been possessed, but for the purpose of imposing a fine and imprisonment upon the defendants, and is based upon certain British statutes now of force in this district—a criminal and not a civil proceeding.

From time immemorial private rights in England, whence we derive our system of jurisprudence, have theoretically at least been held in high respect and veneration. When the common law of Great Britain was in its infancy, when society was rude and comparatively unorganized, and when

courts of justice were more rarely open and less accessible and less facile in their forms of proceeding than the advance of civilization has made them, men were frequently constrained to rely upon the strength of their own right arms and the aid of their friends and retainers to assert and maintain their individual claims to the possessions to which by justice and right they were entitled. Hence it was declared by the courts in the early days of English jurisprudence, that no man was punishable at the common law for the exercise of force or the use of the strong hand in demanding and obtaining the possession of lands and tenements into which the right of entry was given by law. In other words, every man had the right to take possession of his own lands, and to turn out and keep out all intruders and interlopers by force, so long as he should measure that force by the necessity of his case in securing and retaining possession of his lawful property.

In the exercise of this natural right, he was not responsible to society in the way of indictment or other criminal proceeding. In the progress of society, however, it was found that individuals, in having recourse to violent methods of doing themselves justice, inspired terror in the community, and thereby disturbed the public peace and tranquility. For this reason it was deemed prudent by the English law-givers of the fifteenth century to put an end to the enforcement of rights of entry by individual power, and remit all persons seeking restitution of their estates in lands to the more powerful remedies of law. Before these enactments, he alone was liable to indictment for forcible entry who had no right of entry upon the lands of which he had taken forcible possession, (*Vide Dalt.*, 297; 1 Hawk. P. C., ch. 64, secs. 1, 2, 3; 3 Bac. Abr., Tit. For. Ent.) Among the Romans it was otherwise. There the civil law, in its anxiety to preserve and protect the peace and good order of the community, had made it a criminal offense, even in the rightful owner of an estate, to take possession of it by force and violence.

The first modification of the common law of England on the subject of forcible entry was that which took place in the reign of Richard II, by the enactment of that which is known as the statute of 5 Rich., II chap. 8.

The words of this statute are as follows: "And also the king defendeth that none from henceforth make *any* entry into any lands and tenements, but in case where entry is given him by the law, and in such case not with strong hand nor with multitude of people; but only in peaceable and easy manner, and if any man from henceforth do to the contrary and thereof be duly convicted, he shall be punished by imprisonment of his body and thereof ransomed at the king's will." This statute, it will be seen, made it a criminal offense in him who, though entitled by law to his entry into his own land, should make that entry with strong hand, and the punishment was imprisonment, &c. As no provision is made in this act for the mode of conviction, nor any specific tribunal before which the offender was to be tried, it follows that the mode of proceeding and the tribunal in which it was to be conducted was to be the same which were provided by the common law against him who had made forcible entry without right; and that was by indictment before a court having criminal jurisdiction. This statute makes no provision for restitution to the party injured, nor does it provide against forcible detainer unaccompanied by forcibly entry.

Thus the law remained for a period of some ten years, when, to meet the supposed necessities of society and to remedy the omissions in the former act, it was enacted by 15 Rich. II. ch. 2, that "*on complaint* of forcible entry into lands or other possessions whatsoever, to the justices of the peace, or any of them, the justices or justice take sufficient power of the county and go to the place where the force is made, and if they find any that *hold such place forcibly after such entry*, they shall commit them to the next jail, there to abide, *convict by the record*, of the same justices or

justice, until they make fine and ransom; and that the people of the county and the sheriff shall assist, &c., on pain of imprisonment and fine."

This statute does not apply to the case of forcible detainer merely where the entry was not forcible, but only to the case of forcible entry followed by forcible detainer, and the justices, in order to have jurisdiction for the purpose of punishing the offender, must act upon complaint, and must also, when they arrive on the premises, find the offender still remaining there and *holding* forcibly.

Thus it will appear that whereas at the common law before the passage of either of these acts, no one could be punished for forcible entry and detainer but him who made the entry without right, and then only by indictment before a court of general criminal jurisdiction. Now, by the effect of these two statutes of Richard, a new offense was created, to wit, an entry with strong hand by him who had right of entry, and jurisdiction is conferred upon inferior officers of the law to execute those statutes.

Inasmuch, then, as their new offense was created by the statute which did not exist at the common law, and the more especially as the summary proceeding therein provided for is a penal proceeding before a special jurisdiction, the record of the justices must show everything necessary to bring the defendant within the purview of the statute, (*Proctor vs. The State*, 5 Harr., 387). There must, first of all, be a complaint made, and that complaint must be in writing, and be a part of the record in the case. It should be made as other criminal complaints are made, under oath; and as it is to stand in the place of the indictment, like that proceeding, it must be certain to a certain intent in general; that is to say, it must be certain as to the facts, circumstances and intent constituting the offense. Now one of the principal facts making up the offense of forcible entry is locality—the place where the offense is charged to have been committed; and the law is well settled, that in

an indictment for this offense, if there be the slightest variance between the indictment and the evidence as to the name of the parish or place where the house is situated, or in any other description given of it, that variance will be fatal. (Ren. vs. Riddley, R. & R., 515.) It is equally fatal if the place stated is an uncertain or impossible place, or one which does not exist within the justice's jurisdiction. It is also insufficient in a complaint of this character to charge the defendant generally with having committed the offense, all the facts and circumstances which constitute it must be *specifically* set forth. It will not do for the defendant to be charged with having made *forcible entry*, but it must be set forth that with *force and arms and with strong hand* he did forcibly enter, and the complainant, from the peaceable possession, &c., then and there, with force of arms and with strong hand, unlawfully did expel, &c. It will not suffice that the defendant be charged with the removal of complainant's furniture, a removal and expulsion of complainant himself must be charged.

As the case we are now considering was a proceeding of a criminal or penal character, and not one seeking restitution, we have only referred to the acts of 5 and 15 Rich. II, because they are the only ones which relate to forcible entry in its criminal aspect. We make no observations in this case in reference to the statutes of 8 Henry VI, 31 Eliz., or 21 Jac., because they relate only to the proceeding for restitution.

The complaint in this case was made in writing and under oath. But it is excepted to on five several grounds:

1st. For that it is vague and uncertain in its description of the place of the alleged forcible entry and detainer. We believe this exception to be well founded, for the place described in it is No. 450 Sixth Street north, between E and F Streets west, in this city. There is no such place in the city, and cannot be.

2d. The second exception is that it sets forth only a tres-

pass in the carrying away and detaining the furniture of the complainant. This we also hold to be a fatal exception, as the complaint must set forth the expulsion of the complainant himself.

3d. The third exception goes to the insufficiency of the record of the justices in its statement of the offense. This is equally fatal, because the record must show all the ingredients of the offense.

The 4th and 5th exceptions are denials of the verity of the record, which, while we do not feel warranted in noticing them for the purposes of this case, inasmuch as they are contradictions of a record, not made under oath; yet we think proper to announce here that if a case were brought before us on oath of the defendant, setting forth that a justice or justices had acted corruptly or falsified their record, we would not hesitate to order him or them before this Court, and if on a full investigation it should satisfactorily appear that they had so acted, the proceedings would be quashed and the justices removed from office.

For the reasons we have given, it is the unanimous opinion of the Court that the proceedings before the justices in this case be quashed.

NEHEMIAH H. MILLER

vs.

CATHARINE M. JOHNSON.

---

The Maryland Act of 1793, ch. 43, is as applicable to the possession of a term less than a year as to those of one or more years.

Law. No. 737. Decided February 27, 1864.

*Certiorari* to the Justices of the Peace in a landlord and tenant case under the Act of Maryland of 1793, ch. 43.

MESSRS. WILLIAMS and MATTINGLY, for petitioner.

MR. PHILIPS, for respondent.

MR. CHIEF JUSTICE CARTTER delivered the opinion of the Court:

The petition for *certiorari* in this case is based upon the single question, whether a tenancy from month to month is within the purview of the Maryland Act of 1793, chap. 43, which contains the following language:

"In all cases where lands, tenements or messuages are let or leased for one or more years or at will and the lessor or lessors, their heirs, executors, administrators or assigns shall be desirous to have again and repossess the said lands," &c. The act then goes on to provide the remedy which is sought in this case.

The object of this statute was to give a brief and summary remedy to the claimants of estates as against possessors with an estate less than an estate of freehold. The occupancies or tenancies in contemplation of this remedy apparently from the reason of the statute would be brought within its cure in proportion as the term was shortened.

If a summary remedy upon a month's notice is applicable



to an estate for one year or more, *a fortiori* is it more applicable to an estate from month to month. To adopt any other conclusion compels the alternative of providing a remedy requiring more time to complete it than the term itself. Moreover at common law an estate less than a freehold, though it be for less than a year was nevertheless regarded as an estate for years, and would be brought within the remedy afforded by this statute, and such has been the interpretation given to it by this community for seventy years. For that reason, if for no other, we are not disposed to disturb it. In our opinion the remedies of this statute are as applicable to all possessions of a term less than a year as to those of one or more years.

The petition is, therefore, dismissed.

## UNITED STATES

*vs.*

EDWARD W. GRIFFIN AND WILLIAM T. GRIFFIN.

1. This court has jurisdiction of all crimes committed in this District known to the common law, or created by those English statutes in force in this country, or by the statutes of Maryland in force at the time of the cession and not subsequently repealed, or created by act of Congress, which may be tried and punished according to the forms of proceeding known to the common law, that is, by presentment and indictment by a grand jury, and trial before the petit or traverse jury.
2. The "crimes and offenses" referred to by the fifth section of the act of Congress of February 27th, 1801, are all crimes and offenses which are cognizable, that is, triable and punishable, according to the proceedings at common law.
3. At common law, he who without right entered upon the freehold and possession of another, "with force and arms, and with a multitude of people," and expelled the rightful occupant or possessor, was guilty of a misdemeanor, and was liable to be indicted by a grand jury, tried by a petit jury, according to the forms of proceeding at common law, and sentenced to fine and imprisonment.
4. The gist of this offence consisted in entering *without right*, for he who entered upon the possessions of another, and even expelled the actual occupant, if unaccompanied by an assault or battery of the person expelled, might have been guilty only of a simple trespass, and a simple trespass upon the freehold was not an indictable offense at common law.
5. At common law, he who had the right of entry committed no indictable offense in taking that possession even if done with force and arms.
6. The statute of 5th Richard II, which is in force in this District, changed the common law only so far as to make it an indictable offense, punishable according to the forms of proceeding at common law, to forcibly enter into lands and tenements with strong hand and multitude of people, even though the party entering had the right of possession at the time of his entry.
7. The word "ransom" as used in the statute means not only a fine, but a severe fine.
8. As the act mentions no court or tribunal as having jurisdiction or cognizance of the offense mentioned in it, it follows that every tribunal proceeding according to the course of the common law and having general jurisdiction for the trial of crimes and misdemeanors may take cognizance of the same when committed within its jurisdiction.
9. Such an offense is, therefore, cognizable by this court upon an indictment charging it, and concluding, "against the form of the statute in such case," &c.

## STATEMENT OF THE CASE.

INDICTMENT and plea to the jurisdiction. Heard in the General Term in the first instance.

The defendants were indicted for a forcible entry and detainer. The indictment alleged that one Andrew J. Black, being possessed of a certain lot and premises for a certain term of years, whereof two years remained unexpired at the time of the finding of said indictment, the defendants, with force and arms and with strong hand, entered upon said premises and expelled the said Black, and the indictment concludes with the language "against the form of the statute in such case made and provided, and against," &c.

To this indictment the defendants interposed a plea to the jurisdiction of this court, on the ground that the offense charged in the indictment was cognizable before justices of the peace, and not in this court. The question sought to be raised by this plea was ordered by the judge presiding in the Criminal Court to be heard in the first instance at the General Term.

MESSRS. UTERMEHLE and NORRIS, for the defendants.

MR. NATHANIAL WILSON, for the United States.

MR. JUSTICE OLIN delivered the opinion of the Court.

The theory of the defense sought to be interposed in this case is that the offense charged in the indictment, if any, was created by certain English statutes conceded to be in force in this District (and to which reference will be hereafter more particularly made), but that all proceedings under and in pursuance of those statutes, whether by way of punishment for their violation or remedy to the party aggrieved, were cognizable in the first instance exclusively before justices of the peace, and that the only authority this Court possesses upon the subject arises from its general supervisory power over inferior magistrates and subordinate judicial tribunals.

It was not denied upon the argument of this case, and we think cannot be successfully, that this Court has jurisdiction of all crimes committed in this District known to the common law, or created by those English statutes in force in this country, or created by statutes of Maryland in force at the time of the cession of this District to the United States and not subsequently repealed, or created by act of Congress, which may be tried and punished according to the forms of proceeding known to the common law; that is, by presentment and indictment by the grand jury, and trial before the petit or traverse jury.

By the Act of Congress of 27th February, 1801, the Circuit Court for the District of Columbia was created. By the 5th section of that act it was declared, "said Court shall have cognizance of all crimes and offenses committed in said District." By all crimes and offenses here spoken of are unquestionably meant all crimes and offenses which are cognizable, that is, triable and punishable, according to the proceedings at common law.

The main question in this case, therefore, is whether the Statute of the 5th of Richard II, chapter 8, or the Statute of the 15th of Richard II, chapter 2, or the 8th of Henry VI, chapter 9, or the Statute of the 21st of James I, chapter 15, created an offense punishable by the common law proceeding by indictment of the grand jury and trial before the petit jury; or whether those statutes so altered or modified the common law upon this subject of forcible entries or detainers in reference to the possession of real estate, as to render it proper to charge in the indictments that the offense was committed," against the form of the statute in such case made and provided," &c.

To answer this question, it is important to ascertain what was the law prior to the enactment of the Statute of the 5th of Richard II, and to examine and ascertain how the provisions of that act affected or modified existing law.

It is agreed on all hands that, by the principles of the

common law, he, who without right entered upon the freehold and possessions of another, with force and arms, and with a multitude of people, and expelled the rightful occupant or possessor, was guilty of a misdemeanor, and was liable to be indicted by a grand jury, tried by a petit jury, according to the form of proceedings at common law, and sentenced to fine and imprisonment.

It will be observed here, that this offense at common law did not consist in entering upon the possession of another, and even expelling the actual occupant, which might be all accomplished by simply a trespass not even accompanied by an assault or battery of the person expelled, and a simple trespass upon the freehold was not an indictable offense at common law.

We think the weight of judicial authority is that, before the passage of the statute of the 5th of Richard II, he who had the right of entry—that is, he who had the right to the possession of real estate—committed no indictable offense in taking that possession even with “force and arms,” or “with multitude of people,” as described in the technical language of the law. At this day, the unqualified ownership of personal property brings with it the right to its possession, and he *alone* who resists an attempt, simply to take that possession, may be guilty of a breach of the peace.

Such being the state of the common law in reference to forcible entries upon lands, the statute of the 5th of Richard II, declared that, “none shall make entry into any lands and tenements but in cases where entry is given by law; and in such case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner, on pain of *imprisonment and ransom*.”

This is substantially all the provisions of the 5th of Richard II upon the subject of forcible entries. What change did it work in the common law? Obviously none other

than this: It made the forcible entry into lands and tenements with strong hand and multitude of people an indictable offense, though the party entering had the right of possession at the time of his entry. This statute then simply changed the common law in the particular I have adverted to, viz: it constituted an offense indictable and punishable according to the forms of proceeding at common law, to enter with strong hand and multitude of people into the possession of lands and tenements; notwithstanding the person so doing had a right to the possession of such lands and tenements.

It is immaterial to inquire whether this statute created a new offense, or simply reenacted the common law. It defined an offense and made that offense cognizable in all courts proceeding according to the rules of the common law empowered to hear and determine felonies and misdemeanors, and such offense was cognizable in no other court or tribunal. The language of the statute forbids the act of forcible entry, &c., "under pain of imprisonment and ransom." The word ransom means not only a fine, but a severe fine. The act mentions no court or tribunal as having jurisdiction or cognizance of the offense mentioned in it, or created by it. It necessarily followed, then, that every tribunal proceeding according to the course of the common law, and having general jurisdiction for the trial of crimes and misdemeanors would take cognizance of this offense when committed within its jurisdiction.

Now, if the statute of 5th Richard II be in force in this District (and that was conceded on the argument of this case by the learned counsel for the defendants), and if it creates or *defines an offense* cognizable by any court of general jurisdiction for the trial of crimes and misdemeanors, proceeding according to the forms of the common law, it would seem to follow demonstrably that the offense charged in this indictment is properly cognizable in this Court, and that

the indictment properly concludes "against the form of the statute in such cases," &c.

Several other questions of interest were discussed upon the argument in this case, which may arise on the trial of this cause in the Court below. Such as what judgment can be given upon a conviction of the defendants: whether that Court can award restitution as part of its judgment; and whether the complainant is a competent witness upon the trial of the cause, &c. But we do not deem it necessary to decide those questions now. They must be left to be decided by the Court below when they arise.

The order of the Court is, that the plea of the defendants be overruled and the cause is remitted to the Court below, with liberty to the defendants to plead to the merits.

## WILLIAM F. PURCELL

*vs.*

## JAMES COLEMAN ET AL.\*

1. Delivery of possession under a parol contract for the sale of land will not be sufficient of itself to entitle the vendee to specific performance. The possession must be united with the payment or expenditure of money in the purchase of improvement of the land.
2. And the possession must have been taken with the consent of the vendor and in pursuance of the agreement and must be such a possession as would subject the purchaser to an action of trespass unless he be entitled to a decree for specific performance.
3. In equity very little reliance ought to be placed upon loose conversations or admissions of a party which are sought to overbalance his solemn denial on oath in his answer.
4. Evidence of admissions of part performance of a parol contract to convey land are not admissible for the purpose of proving part performance.

Equity. 1706. In Special Term. Affirmed in General Term March 5, 1864.

BILL for a specific performance of a parol contract to convey lands.

THE CASE is stated in the opinion.

MESSRS. BRENT and MERRICK for plaintiff:

The Statute of Frauds is not relied on or intimated in the answer of defendants; but if it had been, it would not apply in this case.

For circumstances which take a case of parol sale or exchange of land out of Statute of Frauds. See *Butcher vs. Stapely*, 1 Vern., 363; *Pike vs. Williams*, 2 Vern., 465; 9 Peters, 103; 1 Story's Eq., 759.

The giving possession is part performance. 1 Story's Eq., Sec. 765, note 1; *Stewart vs. Dent*, (N. & S.), 4 July, 1786; *Simmons vs. Hill*, 4 H. & McH., 252, S. C. of Md.

---

\*Affirmed by the Supreme Court of the United States, see *Purcell vs. Coleman*, 4 Wall., 513.



The possession being mutually given and taken by the parties, entitled complainant to specific performance of the agreement. *Boon vs. Chiles*, 10 Peters, 177.

Time was not of the essence of the contract, and it was enough that Purcell was ready to give a legal title, when the deed to him was ready to be executed. *Brashier vs. Gratz*, 6 Wheat., 528; *Taylor vs. Tongworth*, 14 Pet., 172.

An exchange will be specifically decreed. *McIver vs. Kyger*, 3 Wheat., 53.

It is enough if the vendor has a good title at time of decree. *Hepburn vs. Auld*, 5 Cranch, 262.

Complainant is ready to convey a good title at the hearing. 1 Story's Eq., Sec. 777; *Hepburn vs. Dunlop*, 1 Wheat., 179; Dart on Vendors, 211 and 209.

Mr. GILBERT S. MINER, for defendant:

The defendants maintain first, that the complainant proves no contract of exchange at all; the statements of Coleman, having led no party to act upon them, are, even if accurately remembered by witnesses, who did not charge their minds therewith, but loose and careless declarations which, if they be evidence, are of little weight. *Stark, Ev.*, Vol. II, 24; *Flagg vs. Mann*, 2 Sumn., 486.

2. That the contract proved to have been admitted by Coleman is too vague and uncertain to be enforced by a court of equity. *Colson vs. Thompson*, 2 Wheat, 336; *Hall vs. Hall*, 1 Gill, 383; *Millard vs. Ramsdell*, Harr., ch. 373; *McCue vs. Johnstone*, 25 Pa., 306; *Prentup vs. Mitchell*, 17 Ga., 538.

3. The complainant not being able to make a title free from incumbrance, is not entitled to a decree for specific performance. *Morgan's heirs vs. Morgan*, 2 Wheat., 290.

4. That the contract set forth in the bill of complaint is *prima facie* within the Statute of Frauds, and that the acts of part performance alleged are not sufficient to take the contract out of the statute. *Watts vs. Waddle*, 6 Pet., 389;

Caldwell *vs.* Carrington's Heirs, 9 Pet., 96; Brashier *vs.* Gratz, 6 Wheat., 528; Thompson *vs.* Todd, 1 Pet., C. C., 380; McKee *vs.* Phillips, 9 Watts, 86; Young *vs.* Glendenning, 6 Watts, 510; Sangwer *vs.* Fry, 17 Pa., 495; Moore *vs.* Small, 19 Pa., 461.

MR. JUSTICE WYLIE delivered the opinion of the Court:

This bill is for the specific execution of a verbal contract for the exchange of land, on the ground of part performance. The complainant avers that about the 10th of January, 1861, he entered into an agreement with James Coleman, that he would convey to Coleman a tract of land in Fairfax County, Virginia, in exchange for a house and lot in the City of Washington, which Coleman was to convey to complainant. Complainant further avers that in pursuance of this agreement he was put into possession of Coleman's house and lot, by means of the delivery to him by the latter of the key of the house. Coleman denies, in his answer, that the key was delivered with any such view, but only for the purpose of enabling Purcell to examine the condition of the property, during the pendency of the negotiation between them.

All the evidence which has been taken in the cause, was taken by complainant; no evidence whatever has been taken by the defendants.

Defendants deny the delivery of possession, and rely on the statute of frauds and perjuries.

The first section of the statute of frauds and perjuries, is in these words: "All leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, or out of any messuages, lands, tenements, or hereditaments made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall neither in law or equity be deemed

or taken to have any other or greater force or effect, any consideration for making any such parol, leases or estates, or any former law or usage to the contrary notwithstanding."

This statute has been in force in England and in this country for a period of about two hundred years, and is the law of this District at the present time.

It is not possible to mistake its intent and meaning. Its object was to put an end to transfer of estates of land by parol agreements, or by livery of seisin. The evil to be remedied was that experience had shown that men had in many cases been deprived of their estates by the fraud of parties, and the perjury of witnesses swearing to the existence of verbal agreements, and of livery and seisin of lands, contrary to the facts in such instances, thus doing great wrong to individuals, and rendering titles insecure. This was an evil which no civilized people could long tolerate. To the great majority of the human family, of all earthly possessions land is the most cherished; they toil for it as for no other wealth and defend its possession with their lives.

Of this statute Lord Nottingham said that every line of it was worth a subsidy, and Lord Kenyon said it was one of the wisest laws in our statute books.

If the plain language as well as the spirit of the statute were to be allowed to guide to a decision in this case, the Court could not long doubt or debate as to the decree. For the statute declares that no transfer of title to real estate made by parol only, or by livery of seisin, shall be valid, notwithstanding any consideration for making the same.

But with a people most of whom were ignorant of the art of writing, and whose habit of seeing estates conveyed by parol, and livery of seisin, was inveterate, by at least four hundred years of age, the statute, unless tempered to the times by judicial interpretation, was deemed likely to become a parent of great hardship in individual cases.

This supposed hardship of the statute, and the remedy

which the courts applied are clearly and correctly stated in a note of Mr. Chitty to the second book of Blackstone's Commentaries, which I shall quote: "Courts of Equity, though the practice has been lamented, have long been in the habit of deciding upon equitable grounds in contradiction to this positive enactment. The earliest case of the kind appears to have been that of *Foxcroft vs. Lyster* (Roll's P. C. 108). By the highest tribunal in the realm it was decided to be against conscience to suffer a party who had entered into land, and expended his money on the faith of a parol agreement to be treated as a trespasser; and for the other party in fraud of his agreement (although that was only verbal) to enjoy the advantage of the money so laid out. This determination, though in the teeth of an act of Parliament, was clearly founded on sound abstract principles of natural justice, and confirmed as it has been by an almost daily succession of analogous authorities, is not now to be questioned."

As to the acts of part performance sufficient to take the case out of the statute: "It is in general of the essence of such an act that the Court shall by reason of the act itself without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that, which, according to their legal rights, they would be in if there were no contract." Per V. C. Wigram in *Dale vs. Hamilton*, 5 Harris, 381. For instance, if possession have been delivered, so that the purchaser would be a trespasser on the land, if there were no contract for its purchase under which he obtained possession, this, according to some authorities, would constitute such a change in the situation of the parties, as to call for the interposition of a court of Equity to decree a specific performance of the parol agreement, to save the purchaser from the fraud of the vendor, who otherwise might sue him in trespass and recover damages, when, if the facts could be shown, his possession was rightful and not tortious. This, at least, is the reason

given by many of the authorities on this point. And yet, in the language of Woodward, Justice, in *Moore vs. Small*, 7 Harris (Pa.) Rep., 461, possession is an act which admits of compensation, and, therefore, too much is made of it when it is treated as sufficient ground for specific execution. It may be added, also, that proof of the fact that the party had been put into possession of the land, with the consent of the owner, would be enough to defeat a recovery of damages in any action of trespass which the latter might bring against him. But whether the reasons given for the rule be good or otherwise the authorities for the rule are numerous and weighty, especially in the English Courts.

Other authorities, however, seem to hold that the delivery of possession alone would not be sufficient in all cases.

In *Moore vs. Small*, already referred to, the Court say that "every parol contract for the conveyance of land is within the Statute of Frauds, except when there has been possession, and such a part performance as cannot be compensated in damages," and "without possession taken and maintained under the contract, there can be no pretence of part performance."

In *Young vs. Glendenning*, 6 Watts, 510, Chief Justice Gibson says: "Slight and temporary erections for the tenant's own convenience, doubtless give no equity; but permanent improvements give an indefeasible title to have the contract executed." The same doctrine is reiterated and confirmed in *Gangwer vs. Fry*, 5 Harris, 495. The true principle in the abstract is to be found clearly and neatly stated by Rogers, Justice, in *McKee vs. Philips*, 9 Watts, 85: "Nothing is to be considered a part performance which does not put the party into a situation which is a fraud upon him unless the agreement be performed."

To these authorities may also be added the earliest case decided after the passage of the statute, the case of *Foxcroft vs. Lyster* (Colles P. C., 108), cited in Chitty's note to Black-

stone, which has already been quoted, when it was held by the Court that it was against conscience to suffer a party who had entered into land and expended his money on the faith of a parol agreement, to be treated as a trespasser, and for the other party in fraud of his engagement (although that was only verbal) to enjoy the advantage of the money so laid out."

The rule, as has been said, first came in with this case of *Foxcroft vs. Lyster*, which is the foundation of all the subsequent authorities, and the reason there given for the interference of a court of equity was not merely, or mainly, the delivery of possession under the parol agreement, but the expenditure of money by the purchasers in improvements upon the land.

Without a further examination of the authorities in this place, upon this subject, it is believed that, when all the circumstances of the several cases are taken into account, they will be found to be by no means irreconcilable. And when we look at the reason and spirit of the rule, we are brought to the conclusion that the correct interpretation obtained from a comparison of all the authorities is this: that delivery of the possession under a parol contract for the sale of land will not be sufficient of itself to take the case out of the statute; but that possession united with the payment or expenditure of money in the purchase or improvement of the land, will be sufficient for that purpose.

But by all the authorities the law is clear that the possession taken must have been taken with the consent of the vendor, and in pursuance of the agreement, and must be such a possession as would subject the purchaser to an action of trespass, unless he be entitled to a decree for specific performance. And this alone is enough to defeat the claim of complainant in this case.

Let us look at the facts of his case as made out by complainants' witnesses.

It appears from the evidence that about the 10th of Janu-

ary, 1861, Purcell and Coleman made a verbal agreement for the exchange of the two pieces of property in question, and that Purcell was to have the deeds prepared for that purpose. There was no actual entry upon or delivery of possession of the property on either side. Coleman's house and lot remained unoccupied, and Purcell's farm continued in the possession of his own tenant. The parties were never seen together upon the premises of either. Coleman, however, admitted to several of the witnesses that he had given Purcell possession of his house, and that Purcell had given him possession of the farm, the one in exchange for the other. The witnesses do not prove that he admitted in what ways, or how, this possession was given or taken, on either side. The bill avers that "about the 10th day of January last a trade was made by the said Coleman and your orator, and the possession and key delivered to your orator, by the said Coleman, and the full payment admitted by him by receiving the property above named in Fairfax Co., Virginia." The answer of Coleman denies positively that any possession had ever been taken or given by him, and says that the delivery of the key to Purcell was intended only to enable him to get into the house to examine it. It is to be observed that the bill itself does not pretend that Purcell had ever delivered possession of the farm to Coleman, but only that Coleman had received the farm in payment for his house and lot in Washington, the possession of which Coleman had given to complainant along with the key; that is, as I understand it, possession was delivered by passing the key as a sign or symbol that thereby the possession was delivered. And although the witnesses of complainant swear that Coleman had admitted to them that he had delivered possession of the house to Purcell, and received possession of the farm from him in exchange, yet it is perfectly indisputable, both from the bill itself, and from their whole statements taken together, that in fact, there had been no actual possession delivered or taken on

the one side or the other. It appears that Purcell understood that the transfer of the key as a symbol, gave him not only possession of the house to which the key belonged, but had the other magical effect also, of transferring to Coleman the possession of the farm, which he was to take in exchange for his house.

Not a solitary witness proves that Purcell was seen in possession of the house or that Coleman was ever seen upon the farm. If there had been such actual possession delivered and taken the fact could have been established by a hundred witnesses.

Thus both pieces of property continued to remain after the date of the agreement, "about the 10th of January, till the 22d of the same month," just twelve days, when Coleman moved into his house. This step on his part, was immediately followed by a proceeding against him for forcible entry and detainer, set on foot by Purcell. The two justices who tried the case decided that Purcell was entitled to the possession, fined Coleman fifty dollars and the costs, and on his failure to pay the same committed him to prison, whence he was discharged under *habeas corpus*, by the late Circuit Court. It is true also that whilst these proceedings were going on, Coleman, for the sake of obtaining mercy from the tribunal, by whom he appears to have been regarded as a culprit, consented to leave the house, and surrender the key to the constable, by whom it was passed into the hands of Purcell along with the actual possession.

Thus was closed the forcibly entry and detainer against Coleman; and I must say there are to be found but few examples of greater wrong, or more high handed oppression than this. In this way and for the first time Purcell is now found to have had the actual possession of the property given to, or taken by him. After this it is shown by the evidence he tried to rent the property, and for that purpose put up a notice upon the premises.

But in the meantime Coleman, not feeling exactly satis-



fied to have been thus summarily kicked out of his own house, found another purchaser for it, in Mrs. Miner, the wife of Gilbert S. Miner, to whom he conveyed the property for a valuable consideration, by deed, dated 9th March, 1861. Miner, it is probable, purchased with notice of Purcell's claim. The house, however, was still unoccupied, and on the 27th of the same month Miner, finding it closed, procured a key to be made with which he opened the door, and effected an entrance. He was not, however, to be permitted long to remain in peace. Another warrant from the same justices was immediately issued against him; the justices came upon the ground, examined witnesses, and pronounced the same sentence of fine, costs and imprisonment against the defendant as in the prior case against Coleman. Miner was compelled to surrender his possession. More fortunate, however, than Coleman, by the favor of his adversary, Miner escaped the imprisonment, and the fine and costs remain, it is said, unpaid to this day.

After this, and only after this, was it that Purcell's possession of the property began. He then did actually enter into possession himself, and having fortified his title in this way he filed this bill on the 29th of April asking for a specific performance against the defendants, Coleman and Miner.

The case in its most favorable aspect for the complainant, is nothing more than a parol agreement for the exchange of land, without delivery of possession or the expenditure of a dollar of money by either party. The delivery of the key was only symbolical, and in this view was an idle act. Even the old ceremony of livery of seisin required that the turf or twig should be passed from the hands of the vendor to the purchaser upon the land itself, and in the presence of witnesses. The possession which shall take a case away from the statute, is such possession as would subject the party to an action of trespass *quare*

*clausum fregit* in case the agreement of sale were not upheld by the Court. The key in Purcell's pocket carried to him no such liability. The possession afterwards obtained from the justices was simply an outrage upon the rights of Coleman which he resisted at first with determination and then submitted to under duress, and the same may be said as to Miner.

Nor was there any mutuality in the case. The farm was never conveyed to Coleman; nor is it alleged in the bill or shown in the evidence that Purcell ever gave him possession even by the delivery of a symbol or that he ever spent a day upon the place. It is true the bill avers that a deed for the farm had been tendered by Purcell to Coleman, but no date is mentioned when this offer is made, and the tender amounted to nothing, if made, after Coleman had taken possession of his house on the 22d of January, and thus as well as in other forms given Purcell to understand, that he would not complete the exchange which had been agreed upon verbally. And if made before that date, the refusal to accept the deed by Coleman was notice to Purcell that the former regarded the agreement as void.

Tender of a deed to bind a party to a void contract is a vain act. From that date (22d January) Purcell was a wrong-doer, and his taking possession, and the money he may have since expended upon the property will avail him naught, for it has all been done in defiance of Coleman and against his consent. Coleman had a perfect right to take possession of the property and to announce to Purcell, as he did, that he would not carry out the verbal agreement, and it was Purcell's duty to submit to the loss of the advantage which he believed he had gained. Had he done so he would have stood precisely where he had stood for two weeks before, without having suffered one dollar of injury. The loss of the advantage he had in the bargain constitutes no ground on which to ask the aid of a court of equity. It could not be a fraud in Coleman to refuse to

perform an agreement which the statute declared to be void. Otherwise, the statute would be absolutely annulled by the court, and the greater the advantage which one of the parties had gained in a bargain the greater would be the fraud to deprive him of it. But the courts look at the subject in a different way. With them equality is equity, and they will always carry the statute into effect where the result would be to leave the parties in the situation they occupied before the bargain. Even payment of the purchase money will fail to secure their assistance except to recover it back. And, in my opinion, delivery of possession, by livery of seisin, is just as void to pass an estate, under the statute, as a parol agreement itself. It is so declared to be in express terms. For the purposes of this case it is not necessary to go so far, but it would seem to be the better opinion that the law is now settled as it was settled in the first case that arose under the statute, *Foxcroft vs. Lyster*, that to take a case out of the statute not only must possession have been delivered but the purchaser must also have expended his money in valuable improvements on the land.

Here the opinion might be closed but it is deemed proper to consider the character of the evidence which has been taken in the cause.

No witnesses were examined for the defendants, and the evidence of complainant's witnesses proved nothing in regard to the contract or the possession in pursuance of it except what Coleman had admitted to them. The examination of the witnesses was conducted by complainant in a very extraordinary and improper style. Leading questions, in some instances, were put in such a way as fairly to dragoon the witnesses as to their answers; and in other instances the interrogatories were altogether irrelevant or impertinent. Something of this is, perhaps, to be pardoned to a party who was conducting his own cause, and excited either by the belief that his adversary was trying to defraud him, or by the hope of advantage to himself. However

that may have been, his own depositions fail, as we have seen, to sustain his cause.

But evidence of this kind (admissions) in a cause like the present ought not to be allowed much consideration, even if they are admissible at all, in opposition to the sworn answer of the defendant. In *Flagg vs. Mann*, 2 Sumner Rep. 486, Story J. says: "Very little reliance ought to be placed upon loose conversations, or admissions of the party to overbalance his solemn denial on oath in his answer." In this case the admissions were not only contradicted by Coleman's answer, but so far as they tended to prove actual possession of the house and lot delivered to Purcell, were positively not true, for the very same evidence shows that actual possession never had been taken of the property in question under the agreement, by either of the parties. Besides, possession is a fact which is always capable of direct proof by eye witnesses who knew it, if it be a fact. Nor is this a case in which Coleman would be estopped to deny the truth of his admissions, if he had ever made such, for these admissions were never acted upon as true by any other party. No one had been induced to purchase his claim from Purcell by hearing them, nor had Purcell himself been encouraged by them to expend any money upon the property.

So far as the admissions relate to the agreement for exchange of properties, it is well settled, they are not admissible in evidence; otherwise it would always be competent to set up a valid parol contract in the courts, in defiance of the statute. No admission of the agreement itself will be received, unless it be in writing and signed by the party himself or by his agent who has been authorized in writing. And this by the statute, to prevent perjuries in setting up parol agreements. How then can evidence be admitted of the admission of the fact of part performance by the party to be charged? If proof of the admission of the agreement itself be not admissible, for the same reason, admission of

the part performance is not capable of proof by parol for the same witnesses who would perjure themselves to prove the admissions of the agreement would in this case do the same thing by proving the party's admissions that it had been partly performed, and thus the verbal agreement would be established with the small additional circuitry of two facts instead of one, proved by parol evidence of the party's admissions.

Now, it is an elementary principal in the law of evidence that "the Court will not receive admissions by which any of the principles of law are evaded. Thus, when the husband was willing that his wife should be examined as a witness in an action for malicious persecution, Lord Hardwick refused to permit it, because it was against the policy of the law. Admissions by infants, and admissions evasive of the stamp laws, have been disallowed on the same general principles." 3 Greenl. Ev., sec. 289. Under our act of Congress for raising revenue all deeds, &c., are required to be stamped; otherwise they are void. How would a complainant be received in a court of equity who had no stamp upon his deed or agreement, but who claimed a title at the hands of the Court by proving that defendant had admitted verbally that he had made a verbal agreement, and had put the other party in possession under it. That would be an evasion of the act, and the admissions would be rejected both as to the agreement and the part performance because they were only admissions.

It cannot be denied, however, that courts of equity have permitted the statute of frauds and perjuries to be evaded, and have received parol evidence of the possession and expenditure of money upon land, to make out a case for relief by the decree of specific performance.

It is thought, however, that no case can be found in which this relief has been decreed upon the sole admissions of the defendant made casually and not in writing. The

fact of possession is one which, if it be a fact, is always susceptible of proof by those who have seen it. If it has not been seen it may be safely inferred it has not existed. Since then no authority has been shown for the admission of the evidence which has been taken in this case, from all the great number of cases which have accrued under this statute, reason and good policy alike require that it should not be admitted or considered now.

I will say, with Chancellor Kent in *Philips vs. Thompson*, "I agree with those wise and learned judges who have declared that the Courts ought to make a stand against any further encroachment on the statute, and ought not to go one step beyond the rules and precedents already established."

It has been seen that Purcell was a wrong-doer from the 22d of January, 1861, when he first had Coleman turned out of his house by the two justices. His status for the purposes of this cause is to be treated as fixed by that transaction. Of course he can have no greater or better claim in equity against Miner than he had against Coleman. At the time Mrs. Miner bought from Coleman (the 9th of March, 1861) she no doubt had full notice of the character of Purcell's claim to the property, but that can do Purcell no good, for if she had the notice, that notice informed her at the same time, that his claim was worthless and he a wrong-doer. It is not like the case of notice to a party of an unrecorded but valid deed; but it is like the case of notice to a purchaser of an unrecorded and void deed.

Purcell having paid off an incumbrance upon the property and taken an assignment of the security, holds that claim which will be the subject of the set-off against Miner's claim for the *mesne* profits from the date of her purchase till the date of her recovery of the possession, probably in some other suit, unless otherwise settled.

It is absurd to assert that the assignment of that debt and security vests in Purcell the legal title.

The legal title is in the trustees, who hold it to secure the debt which Coleman owed the Jackson Building Association, and which that association has assigned together with their interest in the security to Purcell. Purcell further alleges that he is the holder of a tax title to the property in question and claims to have specific performance decreed him on that ground also.

But he has neither shown his deed from the corporation, not any of the proceedings at the alleged sale, nor made any proofs on the subject. If he had done all this, it is not probable this Court would have taken up that subject or permitted it to affect its decision in this suit.

UNITED STATES  
vs.  
THE SCHOONER HAMPTON.

---

1. Where a vessel has been captured *jure belli* and not under the non-intercourse acts of Congress, and the vessel and cargo have been libelled as enemy property simply, and in that character condemned, the case does not come under the provisions of the act of Congress intended to protect liens which might be established in the case of a seizure where one-half of the property seized goes to the informer, and the other half to the United States.
2. The act of Congress of March 3, 1863, providing for the protection of certain liens is incomprehensible and therefore incapable of enforcement by the Court.

No. 67, Old Docket. In Admiralty. Special Term. Decided March 7, 1864.

IN PRIZE.

MR. E. C. CARRINGTON, for petitioners.

MESSRS. BEALE and COX, for claimants.

MR. JUSTICE WYLIE delivered the opinion of the Court:

On the 13th of January, 1863, the Schooner Hampton, of Deal's Island, was captured in Dividing Creek, Va., by the U. S. Steamer Currituck, attached to the Potomac flotilla.

The schooner and cargo were libelled, and have been condemned as enemy property in this Court.

At the time of her capture the schooner was under mortgage to Jos. B. Brinkley, of Baltimore, to secure a note for \$823. dated 13th December, 1862, given by William T. Rowe, the owner, for balance of purchase money on the vessel due the said Brinkley, and for cash advanced for repairs, and for merchandise sold and delivered by Brinkley to the said Rowe.

The mortgage was duly recorded at the Custom House at Deal's Island, on the 22d December, 1862.



Brinkley has intervened in the case, claiming that he had a right to payment out of the proceeds of the vessel, by virtue of the Act of Congress of 3d March, 1863, ch. 90.

Brinkley's petition merely states the amount and character of his claim, but is entirely silent as to his loyalty, and as to any knowledge of participation on his part in the illegal use of the vessel.

On the 9th of September, 1863, on motion of the proctor for the claimant, an order was made that the cause be referred to a commissioner to examine the claim of the petitioner. Under this reference the claimant proved the execution of the note and the consideration thereof, viz.: "That the said note was given for the balance of purchase money of the schooner Hampton, and also for cash advanced for repairs, and for merchandise sold to the said Rowe."

The witness, and the only witness, who was called before the commissioner, was John J. Stewart, a clerk of the claimant. The witness proved also that the claimant was a grocer and commission merchant in Baltimore, and a loyal citizen of the United States, to the best of the witness' knowledge and belief.

The schooner sailed from Baltimore on the 9th of January, 1863, on her illegal voyage and without a permit or manifest. There is no positive evidence to show that the claimant had knowledge of or participated in the unlawful venture; but the circumstances are sufficient to raise a strong presumption that he both knew of and did participate in the same. He makes no claim to being a loyal citizen in his own affidavit; nor does he deny his knowledge of or participation in the illegal use of the vessel.

The only witness produced by him has not a word to say on any of these points, except that he makes a feeble endorsement of the claimant's loyalty, "to the best of his knowledge and belief." Nor does he tell how much of the amount due in the note was for repairs to the vessel, nor how much for

the merchandise, nor how much for the balance of purchase money.

On all these points, the Court had a right to be fully informed, and it was evidently within the power of the claimant to supply the information.

The act of Congress above referred to was passed with a view to protect specific liens, held by loyal citizens of the United States, or by citizens of foreign nations, in amity with the United States, against vessels which might be seized whilst engaged in violating the non-intercourse acts. But the act at the same time contains the following proviso: "That no such claim shall be allowed in any case where the claimant shall have knowingly participated in the illegal use of such ship, vessel or other property."

Another objection to the admission of this claim arises upon the face of the statute itself. The capture in this case was made *jure belli*, and not under the non-intercourse acts of Congress; and the vessel and cargo have been libelled as enemy property simply, and in that character alone have they been condemned. The liens intended to be protected were those which might be established in the case of seizures under the acts of Congress, where one half the proceeds belong to the informer, and the other half to the United States.

The present case was that of a capture *jure belli* and not a seizure under municipal law, and one-half the proceeds go to the captors instead of to an informer.

And although it cannot be doubted that an information under the acts of Congress forbidding intercourse with the enemy might have been brought in the present case at the instance of an informer, yet that remedy was not intended to oust the rights of captors *jure belli* to the vessel and cargo as prize of war. War exists between the United States and the States engaged in the Rebellion and the rights of war under the law of nations are, therefore, paramount to those which spring from the merely municipal regulations on

the part of either of the belligerents. See case of the Sally, 8th Cranch, 382.

Besides, still another objection to the allowance of the present claim arises from the fact that the act of Congress of 1863, on which it depends appears to be incapable of being enforced in courts of justice in consequence of the change of its title, which was made on the final passage of the bill.

As the bill was reported the title contained a reference to the act of 13th July, 1861, ch. 3, and the act of August 6th, 1861, ch. 60. The body of the act refers to "proceeding by virtue of the acts above mentioned, or of any other laws on that subject," and provides a remedy for lien creditors in the mode already explained.

But on the final passage the title was changed so as to contain no reference whatever to any of the acts of Congress; and thus in itself the act was made to be perfectly incomprehensible, and therefore incapable of being carried into execution.

The editor of the statutes it is true has given us an explanation of the subject in a foot note to the act of his own preparation, and doubtless his explanation is historically correct; but the Court cannot establish a precedent which would authorize the obscurity of an act of Congress to be removed by a marginal note inserted by the publisher of the laws.

For these reasons the claim of J. B. Brinkley is not allowed.

DAVID ROCHE  
vs.  
WILLIAM T. CARROLL.

---

1. The right of action to recover damages for injuries to the person dies with the person.
2. The Maryland Act of 1785, chap. 80, sec. 1, providing that no action shall abate by the death of either party refers only to such actions as could have been revived at common law.

At Law. No. 129. Decided May 6, 1864.

This was an action to recover damages for injuries received by the plaintiff from the negligent and unskilful driving by the defendants servant of the defendants carriage, whereby the plaintiff was run into and suffered injury, &c. Pending the action the defendant died, and thereupon his death being suggested leave was granted to issue a summons to his executrix. Service thereof being had the executrix appeared and moved the Court "to abate the action." This motion was certified to the General Term for hearing in the first instance.

MR. JOHN S. TYSON, for plaintiff.

MR. WALTER S. CŌX, for defendant.

By the Court:

The plaintiff's right to maintain this action dies with the person of the defendant. The action cannot be revived against his personal representatives, notwithstanding the words of the Statute of Maryland of 1785, chapter 80, section 1, be that no action shall abate by the death of either party, it being the opinion of the Court that the words "no action" is meant no action that could have been revived at common law.

MARY A. HATFIELD

vs.

JOHN A. HATFIELD.

1. Before the passage of the Act of Congress of June 19, 1860, (Stats. at Large, V. 12, p. 59), no Court of this District possessed jurisdiction over the subject of divorce.
2. Under the fifth section of said act, a divorce can not be granted by the Courts of this District, when the grounds of it occurred while the parties were domiciled in, and subject to some other and foreign jurisdiction, unless the party applying has resided within this District for two years. This Court will, therefore, not assume jurisdiction to grant a divorce between parties, neither of whom is or ever was a resident of this District, simply because the adultery complained of was committed here.

Equity. No. 187. Special Term. Decided May 20, 1884.

Affirmed in General Term, November 7, 1884.

PETITION for divorce.

THE FACTS are sufficiently stated in the opinion.

MR. M. THOMPSON for petitioner.

MR. JUSTICE OLIN delivered the opinion of the Court:

This suit is brought to obtain a divorce from the bonds of matrimony, upon the ground of adultery. The defendant, though personally served with process, did not appear or defend the suit.

When the cause was first brought to a hearing upon pleadings and proofs, the petition was deemed so defective in several particulars deemed essential, that an order was made dismissing it, unless the same were amended in the several particulars mentioned in the order.

The petition was accordingly amended, in pursuance of the order, so far as the facts of the case would permit, and the cause is again before the Court for a final decree.

The petitioner alleges that, at the time of filing her petition she was residing in the city of Baltimore, in the State

of Maryland; that the defendant, to the best of her knowledge and belief, has no permanent domicile unless it be in the District of Columbia; that she was married to the defendant in the State of Pennsylvania; and that the adultery complained of was committed in the city of Washington, in this District.

The question therefore arises in this case, whether this Court will assume jurisdiction and grant a divorce between parties, neither of whom (so far as the Court is informed) is, or ever was, a resident of this District, simply because the adultery complained of was committed here.

Before the passage of the act of Congress of the 19th of June, 1860 (see Statutes at Large, vol. 12, page 50), no Court of this District possessed jurisdiction over the subject of divorce. At common law neither a court of law, or a court of equity, have power to grant a divorce. See Willard's Equity Jur., p. 655.

Though courts of chancery, in this country, have entertained suits to decree the nullity of a marriage in cases where there had been no *legal contract of marriage* between the parties, by virtue of its original and inherent jurisdiction. See *Weightman vs. Weightman*, 4 Johns. Ch., 342.

The act of Congress before referred to conferred upon the late Circuit Court of this District the power to grant divorces from the bonds of matrimony, and divorce from bed and board for the causes therein enumerated, and the late act abolishing the Circuit Court and creating instead thereof the Supreme Court of the District of Columbia, conferred upon the latter all the powers, authority and jurisdiction possessed by the former.

The first section of the act of Congress, upon the subject of divorce in the District of Columbia, simply confers jurisdiction upon that subject upon the Circuit Court of this District.

The second section prescribes the mode of procedure in suits for divorce.

The third declares the causes for which the marriage contract will be annulled; and those causes are substantially but two—

First, in cases where either of the parties, when entering into the contract of marriage commits adultery.

The fourth section prescribes the causes for which a divorce from bed and board will be granted; and the fifth section of the act is in the following words:

“No divorce shall be granted for any cause occurring out of this District, unless the party applying for the same shall have resided within the District for two years next preceding the application.”

The foregoing are substantially all the provisions of the act of Congress in reference to the subject of divorce necessary to be referred to as bearing upon the question in this case. I have quoted the fifth section at length, for the reason that its provisions are claimed by the counsel for the petitioner to have an important bearing on the case.

It is argued by counsel that, inasmuch as it is provided that “no divorce shall be granted for any cause which shall have occurred out of the District, unless the party applying for the same shall have resided within the District for two years,” it follows, at least, by implication, that any one may prosecute a suit for divorce in this District, when the cause for such divorce occurred in it.

I do not assent to the logic of that interpretation of the statute. It by no means follows that the legislature of this District intended this Court should exercise jurisdiction in all cases of divorce where the act or acts upon which the application for divorce is based, were done or committed in this District (no matter where the residence or domicile of the parties were), simply because it has provided, that unless the act or acts were done in this District, no suit for a divorce should be entertained, unless the party applying shall have resided in the District for two years.

Such a construction of the statute would contravene pub-

lic policy and be most mischievous in its consequences as it would be an assumption of power to control all the rights of parties growing out of the relation of husband and wife, parent and child, between persons having no domicile or residence within this District, rights upon which the very foundation of society rests, and which no well-governed state can or ought to surrender to the control of any foreign jurisdiction.

Hence it has been held by the highest tribunals of several of the States, where a party had gone from the State of his residence and instituted proceedings for a divorce without having changed his actual domicile, such divorce has been held an absolute nullity by the Courts in the State of his actual domicile. See *The Inhabitants vs. Turner*, 14 Mass. R., 227. In that case the Court remarked: "If we were to give effect to this decree, we should permit another State to govern our citizens in direct contravention of our own statutes, and this can be required by no rule of comity."

So in the case of *Borden vs. Fith*, 15 John., 121, it was held, that where the marriage was in Connecticut, and the husband afterwards went to Vermont, and instituted a suit there for a divorce, against his wife, who never resided there, and did not appear in the suit, that the divorce was null and void, being in *fraudem legis* of the State where the parties were married and had their domicile. Story, in his Commentaries on the Conflict of Laws, says (sec. 230, p. 192):

"Upon the whole the doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law, without reference to the place of the original marriage or the place where the offense, for which the divorce was allowed was committed. See also, upon this subject, the very able and learned opin-



ion of Chief Justice Gibson, in the case of *Dorsey vs. Dorsey*, 1 Law Reporter, 287.

But let us look more carefully at the fifth section of the act before quoted. "No divorce (it says) shall be granted for any cause which shall have occurred out of this District, unless the party applying shall have resided within the District for two years," &c. What is meant by the phrase the cause occurring in this District? Suppose the case to be an application for divorce from the bonds of matrimony. The adultery is committed in this District. The parties at the time the adultery is committed are domiciled in and residents of the State of Maryland. Does the "cause of divorce," within the meaning of this statute, occur in this District or in the State of Maryland. I think it may be properly said to occur in the State of Maryland. The causes of the divorce, or the grounds for a divorce are the breach of the marital contract between the parties. It is a personal contract, and the breach of all personal contracts is properly said to occur, if at all, at the place where the parties to it have their residence or domicile. Look for a moment at the consequences attending the construction of the statute contended for by the counsel for the complainant. Husband and wife move into this District, with the intention of making it their permanent residence. They remain here one whole year, and, under our municipal regulations become entitled to all the rights, civil and political, that are possessed by a native of this District. The husband steps over the line of the District into Virginia or Maryland, and commits adultery, must the wife complete a residence of two years in this District before she can apply to this Court for relief from a situation which to her has become disgustingly offensive? Or take the case of an application for divorce from bed and board for cruel and inhuman treatment. The parties have only had their residence within this District for ten days, nay, they may be here on an errand of business or pleasure. If the wife is here treated with brutality she may imme-

diately apply to this Court for a separation from her husband, but though the parties are *bona fide* residents of this District, and have been here domiciled for any period short of two years, the Court is closed against her until she has completed a two years residence within this District, if the outrages upon her rights or person happened to be committed without the limits of the District. I, therefore, conclude that the true intention and meaning of section five is that no one shall be granted a divorce in this District, in case the cause of divorce occurred out of this District, that is, where the parties at the time the acts were committed entitling a party to a divorce, were not residents of this District, until the party applying for such divorce has resided within this District two full years; or, in other words, no party should be permitted to litigate in this Court the question of divorce, when the grounds of it occurred while the parties were domiciled in, and subject to, some other and foreign jurisdiction, until the party applying has resided within this District for two years.

It is true the statute in question is not very happily worded to express the intention I have attempted to deduce from it; I am persuaded, however, that that circumstance will not be regarded as very extraordinary to any one who is familiar with Congressional legislation.

I might, without doing much violence to the language of the fifth section, have adopted the rule of the courts of Scotland, in which it seems to be held not necessary that both parties at the time of the adultery committed, or suit brought, should have their actual domicile in Scotland. There it seems to be sufficient to confer jurisdiction, that the defendant is domiciled in that kingdom, so that a citation may be served upon him; and that a divorce under such circumstances may be granted whether the adultery was committed at home or in a foreign country. See Story's Conflict of Laws, p. 171, sec. 205.

To such a construction of the statute, the observations of

Ferguson, one of the most eminent and learned writers upon Scottish jurisprudence, when commenting upon the rule of law adopted in Scotland, would apply with additional force to this District. That writer says: "These conclusions evidently demonstrate that unless the remedy in this jurisdiction shall be limited either to that which the *lex loci contractus* affords, or to that which the *lex domicilli*, taken in the same fair sense as in questions of succession, might make the public decrees of the only Court in Scotland which is competent to pronounce one in such consistorial causes, become proclamations to invite all the married who incline to be free, not in the rest of the British empire alone, but in all countries where marriage is indissoluble by judicial sentence, to seek that object in this tribunal. Adultery, and presence within the territory, are the only requisites to found the jurisdiction by citation. What numbers of foreign parties may accept such an offer, and may even commit the crime here for the very purpose of affording ground for the action, it is impossible to conjecture."

A decree must be entered in this case dismissing the plaintiff's petition.

[NOTE.—On appeal to the General Term, that Court, November 7, 1864, affirmed the decree dismissing the petition "for the reasons stated in the opinion of Mr. Justice Olin." The dismissal, however, was made "without prejudice."]

WILLIAM F. PURCELL,  
vs.  
JAMES COLEMAN ET AL.\*

---

Where leave is asked to file a bill of review on the ground of newly discovered evidence, it must appear, 1st, that such evidence has come to the knowledge of the party or his agent since the final decree was passed; 2d, that it is material—that is of a character which would probably change the results of the cause if unanswered, or at least raise a question of so much nicety and difficulty as to be a fit subject of judgment in the cause, but it must not be merely cumulative evidence; and 3d, it must satisfactorily appear to the Court that the petitioner could not, by using reasonable diligence, have procured the evidence on the trial of the cause.

In Equity No. 1706. Decided November 1, 1884.

PETITION for leave to file a bill of review.

MESSRS. BRENT & MERRICK, for plaintiff.

MR. GILBERT S. MINER, for defendant.

MR. JUSTICE OLIN delivered the opinion of the Court:

This is an application for leave to file a bill of review, or in other words, to set aside the decree in the cause pronounced by one of the justices of this Court sitting in equity and affirmed on appeal, upon the ground of newly discovered evidence.

The complainant under an order of one of the justices of this Court, and since the affirmance of the decree, has taken several depositions which are produced on this motion and thereby moves the court to judge whether the evidence proposed to be given on the retrial of the cause would probably change the result at which the court arrived on the trial, and if so, whether such evidence might not with reasonable diligence have been produced on the hearing of the

---

\*Affirmed by the Supreme Court of the United States. See Purcell vs. Coleman, 4 Wall., 519.

cause. The principles which govern applications of this kind in a court of equity are identical with those which control a motion for a new trial in a court of law.

1st. The evidence must be newly discovered—that is it must have come to the knowledge of the party or his agent since the final decree was passed.

2d. It must be material, and by this is meant, it must be of a character which would probably change the results of the cause if unanswered, or at least raise a question of so much nicety and difficulty as to be a fit subject of judgment in the cause. See 1 Eden 25, Story's Eq. Pl. sec. 413; Blake vs. Foster, 2d Mosely, 257, 2d John. Chy. Rp. 488, 3 John Chy. Rpt. 124. This rule also excludes evidence which is merely cumulative, that is evidence to points upon which the applicant had given testimony on the first hearing.

3d. The evidence must not only be newly discovered evidence, but it must satisfactorily appear to the Court that the petitioner, could not, using reasonable diligence, have procured the evidence on the trial of the cause. See Young vs. Riply, 16 Vesey, 353.

Tested by the light of these rules the application discloses nothing which would justify setting aside the decree in this cause and granting a new trial.

The evidence proposed to be given by the witnesses, Duffey, Beal and Gunton is in substance the verbal admissions of Coleman that he had made the agreement set out in the bill of complaint in this cause, to exchange his house and lot in this city for the farm of the complainant in Virginia.

Testimony of the same kind, to wit, verbal admissions of the contract and its terms, was given by various witnesses on the trial of the cause differing in no substantial feature from what is offered to be proven by Duffey, Beal or Gunton. This evidence is, therefore, merely cumulative and affords no grounds for opening the case and granting a new hearing. The evidence proposed to be given by the wit-

ness, Collins, is material and important. It is, in substance, offered to be proven by this witness, that after possession was delivered of the house and lot to the complainant by Coleman, the witness Collins, was employed by the complainant to make certain repairs upon the house and premises and that there was expended some hundred or more dollars in such repairs.

This testimony was vitally important, if true, on the bearing of this cause. But it is not newly discovered evidence.

The complainant does not deny and cannot deny, but that he knew as well when the cause was tried, as he knows to-day, that he had employed Collins and expended money in making repairs upon the house and lot. Why was not this evidence given on the trial then? The excuse set up in the papers is that Collins entered the Military Service of the United States in June, 1861, and only returned to the District the present year. It is not suggested that Collins' testimony might not have been taken even in this District, or whether any effort was made to procure it or any application to the Court below to postpone the final hearing until such testimony could be procured. To grant new trials under such circumstances and for such a cause would render litigation interminable.

The evidence proposed to be given by Mrs. Margaret Scott would doubtless have shown quite material and more satisfactory than any given on the trial as to the existence of the contract set up in the bill of complaint. It is alleged that at the time of the making of such contract, she was resident in the complainant's house and actually present and heard the negotiations between the parties, which resulted in the agreement to exchange the house and lot for the farm.

This is the first testimony in the case given or proposed to be given as to the making of the contract which does

not rest solely in the verbal admissions of the defendant Coleman.

It appears from Mrs. Scott's deposition that at the time of making the alleged contract she was resident in the complainant's house and that the contract was made in the house and in her presence. Where Mrs. Scott has been since the making of the contract and up to the time of the hearing in the Court below we are not informed. Still less are we informed how it has happened that the complainant should have forgotten until after final judgment and decree, that the contract was made in his own house and in the presence and hearing of one or more members of his family. Testimony under such circumstances could in no proper sense of the term be called newly discovered evidence. It could much more appropriately be called newly forgotten evidence.

The rule, as we have seen, not only requires that the evidence which authorizes the Court to grant an application of this kind, must be newly discovered, that is, evidence that came to the knowledge of the party for the first time after it was too late to produce it at the hearing, but it further requires that the conscience of the Court be satisfied that the party could not with reasonable diligence have discovered such evidence before the final hearing of his cause.

Of course the complainant knew when the alleged contract was made, if at all. The first and most obvious idea which would have occurred to him when the existence of the alleged contract was denied are, how can I prove the truth of my allegations? When and where was the contract made, and who was present at its making?

It is sufficient to say that the evidence proposed to be given by Mrs. Scott is not newly discovered evidence; but if it were so, it is almost absurd to say that reasonable diligence has been used to discover it.

The motion in this case must be denied.

MICHAEL THOMPSON

vs.

THOMAS F. BOWIE.

1. Promissory notes given for a gambling debt are void even in the hands of a *bona fide* indorser for value without notice of their origin.
2. While the law presumes a promissory note to have been given for a valid consideration, yet the circumstances of the case may rebut that presumption, and it is then incumbent upon the holder to show the true consideration.
3. Evidence that it was the habit of the maker of the promissory note to gamble when drunk, and that he was drunk on the day of the making of the note, and that the payee of the note was a professional gambler is admissible for the purpose of showing that the note was given for a gambling debt.\*

At Law. No. 109. Decided Nov. 12, 1864.

MOTION for a new trial on a bill of exceptions in an action of assumpsit.

The suit was brought to recover the amount of three promissory notes made by Bowie on the 1st of January, 1857, for \$1,000 each, payable to the order of one Frank Steers, from whom the plaintiff purchased the notes before maturity.

The defense was, that the notes were given for a gaming consideration, and that they were, therefore, void in the hands of even a *bona fide* holder for value. To make good the defense, the counsel for Bowie were able only to introduce circumstantial evidence, which was in effect that Steers, the payee of the notes was a common gambler, and at the time the notes were given was the keeper of a gambling house on Pennsylvania avenue, and that he had no

---

\*This case was reversed upon this last point by the Supreme Court of the United States, which held that "evidence of the habit of the maker of a note to gamble when drunk, is not admissible to show that a promissory note made by him, was given for money lost at play." See Thompson vs. Bowie, 4 Wall., 463.



other business and was possessed of no property. They also showed that the body of each of the notes was in the handwriting of John E. James, another common gambler, and a habitue of Steer's establishment, and that there was another note made by Bowie of a like amount and date, made payable to the order of John Campbell, another gambler and employee of Steers, to deal faro. They also proved that on the day of the date of the notes that Bowie was grossly intoxicated and entirely unfit for any business whatever, and that when under the influence of liquor he had a propensity which he could not control to visit gambling establishments and play at their games.

The exception was to the ruling of the Court, in admitting this evidence.

MESSRS. ROBERT J. BRENT and R. T. MERRICK for plaintiff.

1. It was error in the Court below to admit evidence showing that when intoxicated, it was defendant's *propensity* to gamble. If A had money stolen, could he recover from B on proving B's propensity to steal? Could A defeat B's recovery at law by proving that B had a propensity to make usurious contracts. *Jackson vs. Smith*, 7 Cowen, 717.

It was error to allow the defendant to read in evidence a note executed in favor of one Campbell and indorsed by him to one Johnson on proving that the said Campbell frequented the gaming house and assisted the said Steer in gambling. *Beauchamp vs. Parry*, 1 Barn & R., 89; 6 Dowl. & Ry., 379, 1 R. & M., 212; *United States vs. Dunn*, 6 Pet., 57; *Shaw vs. Bronne*, 4 D. & R., 731; 3 Phil. Ev., 289; *Bristol vs. Dan.*, 12 Wend., 142.

If there were no error in admitting this testimony, yet there was error in refusing to instruct the jury that this evidence, taken with the other facts, did not constitute sufficient evidence to prove a gaming consideration.

The plaintiff stood in Court as a *bona fide* purchaser of a

negotiable security, with every presumption in his favor, and a violation of law cannot be presumed. 3 Kent, 80, note a; *Swift vs. Tyson*, 16 Pet., 1.

Endorsement presumed to be on day of date, and for valuable consideration, and *onus* on defendant to overturn this presumption. 6 Md., 338; *Pinkerton vs. Bailey*, 8 Wend., 602; *Webster vs. Lee*, 5 Mass., 335; 3 Day, 311.

Direct evidence is required to overturn the presumption of the legality of a contract, and mere conjecture will not suffice. *Torringer vs. McBurney*, 5 Cowen, 253; *Witten vs. Flardesty*, 16 Md., 16; *Corner vs. Pendleton*, 8 Md., 337; *United States vs. Dunn*, 6 Pet., 57; 1 Phil. on Ev., 605, 607.

Suppose all the evidence were embodied in a special demurrer, it must have been sustained. There was no connection direct or indirect shown between the gambling houses of Steer and the execution of these notes, and the Court should have charged the jury that the evidence was insufficient. *Stockett vs. Ellicott*, 3 G. & J., 126; *Belt vs. Mariott*, 9 Gill., 334; *Morton vs. Bowie*, 3 Md., 251; *Thurston vs. Lloyd*, 4 Md., 283; *Gray vs. Cook*, 12 G. & J., 236.

MESSRS. WALTER S. COX and SAMUEL L. PHILLIPS, for defendant:

By the Statute of 9 Anne, ch. 14, sec. 1, which is reported as being in force in the District of Columbia, the notes are not voidable, but absolutely void, under any and all circumstances. Being void, they can receive no new life or efficiency from the hands of an innocent holder.

It is so laid down in Story, Prom. Notes, sec. 192, and the authorities there cited; and also in the following additional and later authorities it is distinctly held that a negotiable note given for a gaming consideration is void, even in the hands of an innocent holder for value. *Unger vs. Boas*, 13 Pa., 601; *Manning vs. Manning*, 8 Ala., 138.

It was not contended before the Court below that the testimony offered established the defense beyond all doubt, but that the numerous independent and circumstantial facts

proved, warranted their admission to the jury, as showing the hypothesis of the defense to be exceedingly probable.

In relying upon this kind of testimony, no necessary or invariable connection of facts is required (per Parke, J., 3 B. and A. D. 890), but simply that the circumstances should be so strong in themselves as to established the reasonable probability of the fact intended to be proved.

Nor is it necessary that each fact offered in evidence should bear directly upon the issue. It is admissible if it constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it (Greenl. Ev., sec. 51, a); and inasmuch as the value of this evidence depends upon the ordinary affairs of life, namely, the process of ascertaining one fact from the existence of another, without the aid of any rule of law, which is the exclusive province of the jury, it is submitted that the Court below committed no error, unless it be shown that it had not only no tendency to prove the issue or to corroborate any of the material facts which tend to it (for if it had no such effect, the jury would disregard it and the plaintiff would not be injured), but also it should further appear before error can be found, that it had a manifest tendency to mislead the jury.

After other evidence, the defendant offered to prove, by one very competent to know, the brother of the defendant, that, whenever the defendant was under the influence of wine or spirits, he had a propensity or habit of going into gambling houses and there gambling, and which he exhibited at no other times. To this evidence the plaintiff objected, but the Court nevertheless admitted the testimony.

The question raised is this: does evidence of the habit or invariable propensity of defendant to gamble when intoxicated, and of the fact of the intoxication at a certain time tend, in connection with the other facts of this case, to prove a transaction of that date to have been the result of gambling? We submit that it does.

The foundation for the admission of all presumptive evidence is, the known relation between like causes producing like effects; and whenever it is known that a certain cause usually produces the same effect the rules of evidence admit either to prove the other. Nor is it necessary that there should be any certain or uniform connection between the two. It is sufficient to raise it to the dignity of evidence, if this connection exists in a majority of cases, or, to apply the principle to this case, if it is found in human experience that men do exhibit, when under the influence of ardent spirits, the same propensities or phenomena, then if such phenomena or habits are proved in regard to them at a certain time, the fact that they do generally exhibit such habits or phenomena, when under intoxication and that they were intoxicated at that particular time is admissible, as tending to prove the issue.

It had been decided again and again by the Courts, in civil as well as in criminal cases, that wherever a particular trait of character is involved in, or is illustrative of, the matter disputed there, the character of the party in that particular trait may be given in evidence. *McNalb vs. Lockhart*, 18 Ga., 495; *Greenl. Ev.*, sec. 54.

Thus, honesty in cases of felony, peaceable disposition or quarrelsomeness when drunk, in those of riot, etc.; chastity in those of seduction and criminal conversation, etc., etc. By the admission of such testimony, the courts recognize the principle contended for, that a man known to act usually in a certain manner under certain circumstances will be presumed to act in the same manner when shown to be subjected to the same circumstances.

The issue in this case involves the question, did the defendant game on January 1, 1857, and were these notes given in consequence of gaming? This is in realty the issue in the case, and, therefore, his habit or character for gaming is admissible, if he had such. The case before the Court presents itself in a stronger light than the adjudi-

cated cases where the general character is admissible, we contrast the testimony. We show, first, his invariable propensity or habit of gaming when excited with spirits, and then we put him by the testimony in that condition at the time the notes are given, and show that the men with whom this transaction took place at that time, were professional gamblers. *Parks vs. Ross*, 11 How., 373.

If an exception involves the sufficiency of the facts proved as this does, it should be shown that the evidence detailed is all which was given to the point. *Stearns vs. Warner*, 2 Ark., 26; *Richardson vs. Denison*, Ark., 210; *People vs. Bodine*, 1 Den. 281.

It is nowhere stated in the record that the evidence there recited is all that was given. But the substantial and meritorious ground upon which the learned judge below overruled the said prayer was, that there was testimony given in the case from which a jury might fairly and reasonably find a verdict for the defendant.

The rule of law is too well established to need authority that a demurrer to evidence admits not only the facts stated therein, but also very conclusion which a jury might fairly or reasonably infer therefrom (*Parks vs. Ross*, 1 How., 373); or as applied more particularly to circumstantial evidence, it admits every fact and every conclusion which the proposed evidence conduces to prove. 2 Phil. Ev., 1009.

Tested by these rules, the question at once arises, can no reasonable inference be drawn from the fact that three notes of a wealthy gentleman, all of the same date, in the same handwriting, for the like amount, and of a regular series of 30, 60, and 90 days, given at one time and in the same transaction, are found payable to a professional gambler, at a time when he is a keeper of a public gaming house, and has no other ostensible business, a man of no property, with which he might engage in lawful commerce?

From the fact that the body of each of these notes was in the handwriting of one John R. James, a professional gam-

bler and frequenter of the gambling house of the said payee, and from the additional fact that a fourth of the same series and like handwriting as the others of the same date and for the same amount, is found payable to the order of one John Campbell, who was not only a frequenter of the gaming house of the said Steer, but in his employment as a dealer of faro. We ask, is it not a fair inference from these facts that these notes had their origin in the gaming house of the payee, and in the ordinary business which was carried on there? But these facts do not stand alone. It was further claimed that on the early morning of the very day the notes were given, the defendant was in a grossly intoxicated state, and no more seen that day, and when in that condition he exhibited an invariable habit of frequenting such places, which he did at no other time. Are not the inferences that these notes were made in the common rendezvous of the said gamblers and for a gaming debt, rendered immeasurably stronger when we find the victim of their arts in such a state as to be not only deprived of his judgment, and thereby an easy prey, but from the condition he was in, uncontrollably impelled to gambling?

There are so many circumstances, all interlacing and depending upon each other, and all pointing towards the same result, all reconcilable with the hypothesis of the defense, and improbable with any other, that we respectfully submit that the Court was right in refusing to say to the jury that there was no evidence tending to prove the defense or from which a reasonable inference of its truth might not be drawn.

It is apparent from the whole of this testimony, that while no one isolated fact would warrant the jury in finding their verdict, yet so many are the circumstances each drawn from independent sources that it is hardly possible in human affairs that all these things could have happened, all pointing to the same result, and yet the notes have originated in any other than a gaming transaction.

MR. CHIEF JUSTICE CARTER delivered the opinion of the Court:

The proofs in reference to the defendant in this case are that he was irrational when under the influence of liquor. In the case of insanity it would be perfectly competent to prove the idiosyncracies of the insane person. Why not when reduced to the condition of temporary inebriety?

As to the point taken that the plaintiff in this action is a *bona fide* holder and stands in a different position from the payee of the note, the Court cannot perceive the distinction. These notes were condemned by the law and had no virtue even in the hands of an endorsee without notice of their origin.

What would have been the proof if this man Steers had been in court instead of the plaintiff? We would then have presented this case. The defendant, a member of Congress, a member of the bar, and a man in reputable standing is reduced on a festal occasion to inebriety so as to deprive him of all reason and judgment. He is seen going through the streets in this condition at two o'clock in the morning, and that is the last heard of him until the next day, when three gamblers are found in possession of his notes to the amount of \$4,000.

It has been argued that the law presumes these notes were given for a valid consideration. But that presumption may be rebutted by the circumstances of the case, and the evidence in this case, if it goes no further, goes far enough to put the plaintiff upon explanation. The fact that none has been given goes to show the true consideration of this transaction and justifies the conclusion that the notes were given for a gambling consideration.

The judgment is affirmed.

## J. W. THOMPSON AND WILLIAM THOMPSON

*vs.*

## GEORGE W. RIGGS ET AL.\*

1. The liability of a banker who receives deposits of money, to pay out the same on the checks of the depositor is implied by law and does not require any special contract.
2. The relation of a banker to his depositor is that of a debtor to a creditor and not that of a bailor, agent or trustee.
3. Where there is a special contract, its terms define all the rights and liabilities of the parties, and evidence of custom or usage cannot be received to vary or affect those terms.
4. So, where the liability of a party is fixed and clear under the law, evidence of usage is irrelevant since it can neither confirm, detract from, nor in any way effect such liability.
5. Where the parties have agreed upon a particular place where a contract, the terms of which are doubtful, is to be performed, the usage of that place may be given in evidence for the purpose of interpreting the contract.
6. The Act of Congress of February 25, 1869, ("The legal tender Act") and the subsequent Acts containing similar provisions, apply to ordinary bank deposits, and a tender of Treasury notes in payment of a check, drawn by a depositor, whose only deposits had been made before the passage of the Act and in gold coin, is a legal tender notwithstanding that the bank prior to the Act had always paid such checks in gold coin.
7. Legislative Acts are not to be pronounced unconstitutional on slight implication and vague conjecture, the opposition between the Constitution and the Act in question should be such as to lead the Court to a clear and strong conclusion of their incompatibility with each other.
8. The Acts of Congress known as the "Legal-tender Acts" are not unconstitutional.

Law No. 922. Decided Nov. 7, 1864.

MOTION for a new trial on exceptions.

THE FACTS are stated in the opinion.

MESSRS. JOSEPH H. BRADLEY and NATHANIEL WILSON, for plaintiff:

The Court erred in refusing to allow us to prove the averments of the declaration, and rejected evidence from which,

---

\* Affirmed by the Supreme Court of the United States, see *Thompson vs. Riggs*, 5 Wall., 663.



unaided by express stipulation, the jury might have found, and the law inferred, an obligation to return specie deposits in kind.

The uniform custom of banks in the District of Columbia, constitute a part of the contract between bankers and depositors. *Renner vs. Bank of Columbia*, 9 Wheat., 582; 1 Sm. Lead. Cas., 679; 1 Pars. Cont., 48, 49.

The Court erred in granting the instruction asked by the defendants. Neither the letter nor the policy of the legal tender acts affects a contract such as that set out in the record. *Metr. Bank vs. Van Dyck*, 27 N. Y., 400; *Schoenberg vs. Watts*, District Court of Philadelphia, 1 Am. Law Reg., 553; *Wood vs. Bullens*, 6 Allen (Mass.), 516; *Buchyger vs. Schultz*, 5 Am. Law Reg., 95; *Carpenter vs. Atherton*, 21 Am. Law Reg., 225, Feb., 1865; *Barrington vs. Potter*, 1 Dyer, 81 *a*; 20 Vin., ab. 177, 178; *Pong vs. Lindsey*, 1 Dyer, 82 *a*; *Robinson vs. Noble*, 8 Pet., 181; *Faw vs. Marsteller*, 2 Cranch., 30.

MESSRS. J. M. CARLISLE and W. S. COX, for defendant in error.

The second instruction asked by the plaintiffs proceeds upon the idea of an express and special contract; that is, a contract to do some thing special, as distinct from a mere promise to pay a money debt; the object being to except this case from the operation of the act of February 25, 1862, upon all debts. The instruction was properly refused, because there was no evidence of any such contract. There was no express contract or promise of any sort. There was nothing expressed but the acknowledgment of the receipt or deposit of certain moneys to the credit of the depositors, and no express promise to pay it at any time or in any manner. *Story Prom. N.*, sec. 14; *Grant, Banking*, 2, 3.

Even if an express contract could be proved to return these specie deposits in kind, as averred in the declaration, still it was not a contract to deliver so much bullion, but a

promise to pay so much money. The money deposited was not to be returned, but an equivalent amount in dollars and cents to be repaid. Nothing can be made out of this but a mere money debt, and, therefore, the Court was right in instructing the jury, according to the prayer of the defendants, that even if they found that the coin was deposited with the defendants as bankers, to be repaid in coin, this merely created a debt which could be discharged in legal tender notes.

On this point see *Shallenberger vs. Brenton*, 3 Am. Law Reg. (U. S.), 59; *Schoenberger vs. Watts*, 1 Am. Law Reg. (U. S.), 553; *Warmbold vs. Schlicting*, 16 Ia., 243; *Wood vs. Bullens*, 6 Allen (Mass.), 516; *Appel vs. Woltman*, 6 Am. Law Reg. (U. S.), 248, reported, 38 Mo., 194; *Buchyger vs. Schultz*, 5 Am. Law Reg. (U. S.), 95.

The plaintiff, at the trial, relied upon evidence of the usage of the bank of the defendants, after the suspension of specie payment by the United States in January 1862, and especially after the act of February 25, 1862, in repaying specie and currency deposits in kind and offered evidence of a similar usage on the part of other banks, which was refused; and this refusal was the ground of the first exception.

A usage or custom is referred to, either as the law governing the dealings between parties, or in order to ascertain their presumed intention.

But in either case it can only be resorted to where the contract and the statute law are silent. No usage can exist in opposition to the statute, nor is there such a thing as an usage coincident with the statute which in fact consists merely of obedience to the statute.

Where the statute prescribes a rule of action the obligation as well as the meaning of the parties is referred to and ascertained by the statute.

*Wigglesworth vs. Dallison*, 1 S. M. Lead, Cas., 670 (Doug.

201); *Renner vs. Bank of Columbia*, 9 Wheat., 582; *Camden vs. Doremus*, 3 How., 515.

It will be maintained that this act was within the power of Congress conferred by article 1, section 8, of Constitution.

It is settled, that in the choice of means to carry into effect its powers expressly granted, Congress is not restricted to those which are absolutely essential, but may select those which are useful or conducive to the end, or calculated to effect the object, and Congress is the sole judge of the degree of necessity or expediency. *McCulloch vs. Md.*, 4 Wheat., 316; *U. S. vs. Fisher*, 2 Cranch, 358; *Craig vs. Md.*, 4 Pet., 4, 10; *Buscoe vs. Bank of Ky.*, 11 Pet., 257 and 13 How., 12.

It has been decided that treasury notes may be made a lawful tender in payment of debts to the United States. *Thorndike vs. U. S.*, 2 Mass., 1, 18.

It has been decided that Congress under the power to borrow money, may declare United States stocks and securities exempt from taxation in order to add to their value.

MR. JUSTICE WYLIE delivered the opinion of the Court:

At the trial of this cause in the Circuit Court, a verdict was found in favor of the defendants. Plaintiffs entered a motion for a new trial, on the ground that the instructions given to the jury by the justice before whom the case was tried were erroneous in law. This motion was certified to this Court, has been fully and ably argued, and is now to be decided.

The several bills of exceptions contain the whole evidence, and the material and undisputed facts are as follows:

Defendants were, and still are private bankers, doing a large business in the city of Washington, with whom plaintiffs kept their account in the year 1861, and subsequently until the rise of the present controversy between the parties. In the spring of 1861, defendants were in the habit of re-

ceiving on deposit, from their customers, two kinds of currency, one specie or its equivalent, and the other depreciated bank paper of Virginia and other banks. As yet, Treasury notes had not been issued, and specie was the standard. The accounts kept with plaintiffs, as well as with other customers of the bank, all discriminated between these two kinds of currency. Deposits made in specie funds were paid in specie, and deposits made in depreciated paper were paid in depreciated paper.

The war broke out in April, 1861, and the bank paper, which was already below par, soon depreciated still further.

On the 18th of June, 1861, plaintiffs had their accounts settled, showing a balance in their favor at defendants' bank of \$2,920 in specie and \$2,463.50 in depreciated funds.

Defendants then gave notice to plaintiffs that the account in depreciated paper must be closed, and that thereafter but one account would be kept, namely, that on the specie basis. Between this date and the 3rd of September following plaintiffs withdrew from deposit all their depreciated funds substituting specie deposits in their place, in pursuance of the notice above referred to, so that on this last date, and from that time forward the account between the parties was wholly a specie account.

The deposits made, however, were not always, nor even in the majority of cases, the actual specie consisting of the precious metals; but were frequently in drafts or other funds, which were regarded as equivalent to specie.

Thus the account continued to run between the parties, plaintiffs making their deposits in specie or its equivalent, and checking for specie or its equivalent as suited their convenience.

On or about the 31st of December, 1861, the United States Treasury suspended specie payment, which was immediately followed by a similar suspension by all the banks of the country.

The checks, however, drawn by the plaintiffs on the de-

fendants were still payable, and were paid in specie, notwithstanding this universal suspension of specie payments, in which the Government, from necessity had taken the lead. But on the 25th of February, 1862, an act of Congress was passed, which provided for an issue of \$150,000,000 of Treasury notes, and made them "lawful money and legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

Soon after the passage of this act, plaintiffs made a small deposit of coin with defendants, but as its amount was more than paid in coin on a subsequent check of plaintiffs, that fact may be laid out of view in our consideration of this case.

On the 8th of May, 1862, plaintiffs had to their credit in defendants' bank the sum of \$7,350, for which they drew two checks, one for \$750 and the other for \$6,600.

This evidence given in this cause does not show that either of these checks was presented for payment until the 23d of February, 1864, almost two years after their date, when both were presented, and payment demanded in gold. This was refused by defendants, who, however, made a formal tender of the amount in the legal tender notes of the Treasury, which plaintiffs refused to accept, insisting upon their right to be paid in gold.

The foregoing is a history of the facts, so far as the record shows, out of which the present controversy has arisen.

Plaintiffs have declared on a special contract which they say is established by these facts, and binds the defendants to pay them the whole amount of their claim in gold coin. Defendants have pleaded *non assumpsit*, by which they deny that any such special contract was ever entered into between the parties, and have also pleaded a tender of payment in the legal-tender notes of the Government, the refusal of the same by the plaintiffs and with leave have paid the same into Court.

It is wholly unnecessary, in my judgment, to decide in this case whether a tender of payment in Treasury notes would have been good if there had been a special contract entered into in the summer of 1861 between the parties that the debt due from the defendants to the plaintiffs should be paid in specie.

The terms of contract, relation of the parties in their dealings, and all their conduct touching the present controversy are clearly set forth in the record before us, and, in my judgment, there was no such thing as a special contract between them.

If there was such special contract, however, that would not, in my opinion, change the result.

Prior to the Act of 25th February, 1862, above referred to, all debts were payable in gold or silver, whether so expressed in the contract or not. It required a special contract to alter this obligation. Parties might agree to make payment in something else than gold and silver. But in the absence of a special contract, the law declared that nothing should be a legal tender except gold or silver coin. A special contract to pay a debt in gold or silver coin added nothing whatever to the contract. It might have been struck out of the contract, and the obligation would still have remained unaffected by the alteration. But a contract to pay in depreciated currency, like a contract to deliver so much merchandise or other property, would be a special contract.

So in the present controversy, so long as there were two distinct accounts kept by the plaintiffs with the defendants, one for specie and the other for depreciated paper, the special contract had reference only to this latter account, and not to the former. When the latter account was closed and settled, the parties were left with but one account between them, and that was an account differing in no single particular from any other account kept by these defendants,

as bankers with any of their customers, in the usual manner receiving deposits in specie and paying out the same on the checks of the customer.

This liability of a banker to his customer has never been held to arise out of special contract. The liability is implied by the law, because it would be unjust to permit the banker to retain the money for which he had rendered no consideration to its owner. It is like a thousand other liabilities which arise out of the daily transactions of life, in regard to which the parties have made no formal special agreements, but which are implied by the law because it will not permit men to defraud one another if it can prevent it.

And, although it is common to say that money left in bank is deposited, we must be careful not to be led into error by that term.

Money deposited in bank may be used in the business of the bank. The bank is not bound to keep it as the property of the customer. When left there, it passes at once into and is mingled with the mass of other funds in the bank. It becomes the property of the bank. The depositor is no longer its owner. All that he gets and all that the law allows him to get, is a credit at the bank for the amount of his deposit. The banker owes him that much money, because the customer has left that much in his hands to be used as the former pleases. The banker is neither the bailee of the customer, nor is he the agent or trustee of the customer. The only relation between them is that of debtor and creditor, and the only obligation is that implied by the law, from the fact of the deposit of money. See Grant on Banking, pp. 3, &c.; *Maczetti vs. Williams*, 1 B. & Ad., 415; Comyn. on Con., 5, 6.

We have in the present controversy, therefore, the case of a debt owing and due from one party to another, and arising out of an implied contract, many months anterior to the passage of the law making Treasury notes a lawful

tender in payment of debts, and differing in no particular from any other implied contract of that date for the payment of money.

But in order to strengthen their claim, plaintiffs offered evidence to show that during the whole period of time covered by their account, up to the date of the suspension of specie payments by the Treasury Department, on the 31st of December, 1881, it was the usage of defendants to pay the checks of their customers in specie, when the deposits had been made in specie.

This evidence was not objected to by defendants' counsel, and was therefore received. But in what respect it could fortify their present claim, I am at a loss to comprehend.

It is not disputed that prior to the passage of the Act of 25th of February, 1862, defendants were bound by law to pay their debts in gold or silver coin. The evidence showed nothing more than that it was the usage of the defendants, at that time, to do precisely what the law required at that time.

After the reception of this evidence without objection, plaintiffs then offered to prove that the same usage prevailed, at the same time, with the other banks of the city. But objection was made to the admission of this evidence, and the objection sustained by the Circuit Court; to which decision of the Court exception was taken by plaintiff's counsel.

If there was a special contract in this case between the parties, as alleged in the declaration, then the terms of the contract defined all the rights and liabilities of the parties respectively, and the usage of other banks, whatever it may have been, could not be shown to vary or affect such special contract.

If there was no such special contract, then the evidence offered amounted to nothing more than to show that other banks obeyed the law by paying their creditors in specie, just as the defendants were doing at the same time. Sup-



pose the other banks had not been paying their depositors in coin during this period, could that usage have been admitted as evidence in this case on behalf of the defendants? Certainly not; and why?

Because the liability of the defendants to the plaintiffs was fixed and established by the law. That law obliged the defendants to pay in gold or silver, and proof of usage could neither confirm, detract from, nor in any way affect the rights or liabilities of the parties. There was no controversy that prior to the passage of the Act of 25th February, 1862, defendants were bound by law to pay plaintiffs' checks in gold and silver coin. The evidence offered was to prove that other parties actually did pay their debts in gold and silver coin at that time, as they also were bound to do. The question here is whether defendants are bound to pay their debts in gold or silver coin since the passage of that act.

To my mind the question raised by this bill of exceptions is altogether too plain to require further examination. But before dismissing the subject I will refer to the case of *Renner vs. The Bank of Columbia*, for a clear exposition of the law of the subject of usage in the interpretation of contracts.

When the parties have agreed upon a particular place where their contract is to be performed, the usage of that place will influence the construction of the contract on the principle of *lex loci*. For example, if the contract is to be carried into effect in some named city, then, if its terms be doubtful, evidence of usage in that city is admissible for its interpretation. On the same principle, if the contract is to be performed at some particular bank, then the usage at that bank would be evidence in a proper case.

In the case under consideration the contract, whether we regard it as express or implied, was to be performed at the defendant's bank and nowhere else.

On this ground, also, the evidence offered was properly excluded by the Court.

The next question to be considered is whether the act of 25th of February, 1862, making treasury notes a legal tender in payment of debts, and the subsequent acts of Congress containing similar provisions are applicable to the case before us.

These acts apply to all debts, whether public or private.

It has been argued in this case that the tender of treasury notes was not a legal tender, because the plaintiffs have sued on a special contract for the recovery of damages, and not of a debt.

A debt is a sum certain due from one man to another.

The sum due in the present instance is absolutely certain, and the action of debt might have been sustained for its recovery. The plaintiffs have not thought proper to sue in debt, but in assumpsit claiming that a special contract was entered into between them and the defendants for the payment of so much money in gold coin which the latter refused to pay, and claim damages for breach of this contract.

Now assumpsit and covenant and case may, one or the other, be brought for the recovery of by far the larger number of debts due amongst the members of a community. A promissory note may be made with parties named and certain, date and payment certain, and amount payable certain to a fraction. According to this theory of the act of Congress, if plaintiff should happen to sue in debt on the note defendant may defeat his recovery by proving tender of the debt and paying money into court in treasury notes. But if he have been sharp enough to sue for damages in an action of assumpsit upon the same note, he can force the defendant to pay in gold or silver coin.

Let us examine this theory a little further as to its practical consequences.

It is claimed that the Act of Congress does not embrace

claims for damages. Take it to be so. You sue in assumpsit to recover a debt in the shape of damages. The Act of Congress does not apply to the case. The debt is a certain fixed sum and your verdict and judgment are for that sum with interest and no more. By the rules of law it cannot be any more. But since it is sued for as damages, the Act of Congress does not apply. You get your verdict and your judgment, and what then? Your claim is no longer a claim for damages, but is settled into the fixed and unbending limitations of a judgment. A judgment as a debt, and the defendant at last comes out victor and passes to the marshal this claim of plaintiffs' for damages which the crucible of the law has restored to its original form of a simple debt, in the legal tender notes of the United States.

I cannot believe that the Congress of the United States, in act after act recently passed, have committed so absurd a blunder as to permit a plaintiff to defeat the intent of the law by simply changing the form of his action for the recovery of his debt from an action of debt to an action for the recovery of the same debt in the shape of damages, to be followed by such a result as that just stated.

In the present case the demand is liquidated and certain. Plaintiffs themselves have given in evidence their bank book, showing the defendant's admission of the exact amount which they claim, and besides have proved their own demand of that precise sum made at defendant's bank.

If the act of Congress does not apply to a case like this, it is a stupid disgrace in the legislation of the country, and its operation nugatory—an absurdity not for a moment to be entertained or further debated.

The last and most important question involved in this case is that as to the constitutional power of Congress to make and declare Treasury notes a lawful tender in payment of debts. The duty of deciding a great question like this is one of the utmost delicacy and importance. But, as

it lies directly before us, and is not to be avoided, it cannot be regarded as usurpation on the part of the Court to consider and express their views upon the question. In *Fletcher vs. Peck*, 6 Cranch, p. 87, Chief Justice Marshall said: "The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes."

But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and law should be such that the judge feels a clear and strong conclusion of their incompatibility with each other.

Are, then, the acts of Congress, which authorized the issue of Treasury notes and made them a legal tender in payment of debts clearly unconstitutional?

The power to coin money and regulate the value thereof, is expressly granted to Congress in the Constitution.

The Constitution also declares that no State shall coin money, emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts.

This sovereign attribute, therefore, of coining money and regulating its value belongs to Congress exclusively.

I cannot resist the conviction, however, that under the grant of power to coin money, it was not the intention of the framers of the Constitution to provide for the emission of paper money or bills of credit. Treasury notes are undoubtedly bills of credit. Prior to the Revolution bills of credit on emergency had been issued by several, if not all of the States, and some were made legal tender by law in payment of debts. In other instances they were not made a legal tender, but were left to find their level in the

market, on the credit of the Government's issuing them. During the Revolution they were issued in large amounts both by the States and by the Confederacy. The Articles of Confederation expressly granted to Congress the power to issue bills of credit, and without this power, it was declared by Mr. Mason, an influential member of the convention which framed the present Constitution, the war of the Revolution could not have been brought to a successful result.

The power, however, of coining money, and that of issuing bills of credit were treated as separate and distinct powers, both in the Articles of Confederation and in the present Constitution. By the Constitution the States are prohibited from coining money and also from emitting bills of credit. The prohibition to coin money, if it stood alone, would have still left to the States the power to emit bills of credit.

To emit bills of credit is, therefore, something different from coining money. Hence, the power granted to Congress to coin money does not confer the power to emit bills of credit. That power, if it exist at all, must be found in some other part of the Constitution, or must be an implied power as a necessary and proper means of carrying into effect other powers expressly granted.

The history of the colonies in their wars with the French, and with the Indians, prior to the Revolution proved how necessary it was that this power should be given to the new Government, which was to succeed them in the exclusive right to make war and peace, and suppress domestic insurrection. The Revolution itself, though it flooded the country with bills of credit, which at last became utterly worthless, was sustained throughout mainly from this resource, without which its armies must have been disbanded, and its cause given up in despair.

Every nation which had attained power and greatness in the world had been forced, at some time or another to

resort to the use of paper money in its struggles to maintain existence against the attacks of foreign enemies or domestic war.

These considerations cannot be supposed to have escaped the attention of the eminent men who framed the Constitution.

As already stated, the power to emit bills of credit was expressly granted in the Articles of Confederation. We do not find that it was renewed in the present Constitution in express terms.

At the time when the convention assembled the condition of the country was far from prosperous, and the people were still suffering from the prostration consequent upon the long and exhausting war which resulted in the establishment of their independence. They felt the evils of the continental currency, forgetting the obligations which they owed it for carrying them to final victory and nationality.

Such was the state of feeling when the subject was presented for deliberation in the convention. Mr. Mason and Mr. Madison, both of them sagacious and wise patriots, were in favor of again conferring the power by express terms. Others probably agreed with them, of whose opinions we have no record. Some thought that it was unnecessary to make the express grant, as the power might be implied as a means necessary to carry into effect other express powers. Others, still, denounced the power, and were wholly opposed to it in either shape. A large majority of the convention refused, by vote, to insert the power in the Constitution by express grant. The power, however, was not prohibited to Congress, and it is highly probable that the convention left the subject, designedly, in this condition, that afterwards might decide for themselves according to the exigencies of the republic, whether it was indeed a power necessary to save it from threatening destruction; and if so, that it might then be called into exercise.

By express grant Congress is clothed with power to de-

clare war, to raise and support armies, and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. It is clothed also by express grant with power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

It must be manifest to every mind that without the power to issue treasury notes, and to make them also a legal tender in payment of debts the Government of the United States must have been destroyed before the end of even the second year of the present war.

A war of its vast dimensions could never be supported upon the proceeds of loans and taxes only. The gold and silver of all the world would scarcely suffice for so great an undertaking.

The war was forced upon the government. It could have been avoided only by the government consenting to its own dissolution.

The treasury notes in question were necessary as a means therefore, not merely to carry on the war, but to sustain the very existence of the nation.

Are they unconstitutional?

In the great case of *McCullough vs. The State of Maryland*, 14 Wheat., 316, we have the views of the Supreme Court of the United States applicable to this subject in a luminous and masterly exposition of the powers of Congress, by Chief Justice Marshall. These views are authoritative over this Court, and I will venture also to add, that had they been followed and obeyed in the administration of the government the present rebellion would not have been possible.

I shall quote a few passages from that opinion:

"The Government which has the right to do an act, and has imposed on it the duty of performing that act must, according to the dictates of reason, be allowed to select the means."

Again: "But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or any department thereof."

Another paragraph: "We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and *which are not prohibited*, but consist with the letter and spirit of the Constitution, are constitutional."

The opinion closes with the declaration of the following test, by which the Courts are to judge of the constitutionality of an Act of Congress: "That where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretensions to such a power."

I think, therefore, that the plaintiffs in this action ought not to recover, and the decision of the Court below was right; first, because they have sued upon a special contract, and no special contract was proved; second, because the Court below was right in excluding evidence of usage at other banks than that of the defendants, and no evidence of



usage is admissible to vary the rights or liabilities of parties to a contract, when those rights or liabilities are clear under the law; and third, because the contract between the parties, whether express or implied, was evidence of a debt owing by the defendants to the plaintiffs; that the defendants had a right to pay such debt in lawful tender notes of the Treasury, and that payment of the defendant was tendered in those notes and refused by the plaintiffs, and the notes subsequently tendered in Court at the trial of the cause, and acceptance again refused by the plaintiffs.

I am not quite satisfied to close this opinion without alluding to certain aspersions which have been attempted to be cast during the hearing of the case, upon the honor of the defendants in regard to this transaction.

Ours is to be sure, not a court of honor, but a court of law and equity, and when on these grounds we decide in favor of a party, there our jurisdiction terminates and there, also, in my judgment, our opinion ought to stop.

I must, however, be permitted to say that I have seen nothing whatever in the conduct of these defendants in regard to the matters in controversy, which can even excuse the imputations referred to. They are, in my judgment, wholly ungrounded.

MR. JUSTICE OLIN concurred in the conclusions expressed in the foregoing opinion.

MR. CHIEF JUSTICE CARTER delivered the following dissenting opinion:

The action pending is an action of special *assumpsit*, by which the plaintiffs seek to recover the value of what they allege to be a special contract for the deposit of coin. The facts show that in the summer of 1861, Riggs & Co. were bankers in the city of Washington; that the plaintiffs were business men, doing business as plumbers, and having their bank account with the defendants, and that covering the period of the relations of the parties in the summer of

1861 the bank currency used in the business of the District of Columbia began to lose its credit and public confidence and fell below par, making coin as a circulating medium represent one value and bank currency another. To accommodate the relations of the bank to the business of the District of Columbia, the defendants in common with the other banks and bankers of the District adjusted their books and bank relations accordingly, keeping a coin account to be responded to in coin and a paper currency account to be responded to in paper.

Under these circumstances, we find the plaintiffs as depositors with the defendants in the sum of six thousand dollars, twenty-five hundred dollars of which was in paper currency and the balance in coin, when the defendants notified the plaintiffs that if they would hold the bank responsible in coin for the whole amount of their deposit, they must convert the paper currency proportion of it into coin, whereupon the plaintiffs complied with the request of the defendants and transferred their entire deposit into coin. The parties sustained this relation to each other until the 25th of February, 1862, when the transaction was overtaken by the act of Congress, making Treasury notes a legal tender in payment of all debts. The contract then as settled by the parties was a deposit of six thousand dollars in coin with the defendants as bankers, to be repaid in coin, according to its express stipulations. The defendants have received the plaintiffs' coin. Have the plaintiffs a right to its return or its value? Good faith and conscience answer, "Yes." The question is, "Does the law give any other answer?"

Before considering the effect of the legal tender law of February 25th, a word or two in reference to the objection to the constitutionality of said law. The constitutional objection is made to it, but not argued. I concur with my associates that the law is constitutional. Not, however, because the Constitution expressly gives the power to Con-

gress to make a paper currency lawful tender or a circulating medium. The Constitution does no such thing expressly. On the contrary, it expressly prohibits the exercise of that power on the part of the States and does not expressly confer it upon the Government of the United States. If the power exists at all, it is a power implied in the self preservation of the nation and underlying the express powers granted to the Government for that purpose.

If this act of legislation was vital to the preservation of the Government which I believe, it has its authority in the vitality of the Government. The right of self-preservation is a fundamental law of personal existence—why not of national? The imperious and unavoidable necessities of the Government, I regard as a part of the fundamental and constitutional law of its existence. This principle has been acknowledged practically by all nations in the past, and in the past history of this nation, and while it has not been distinctly incorporated into the letter of the fundamental law, or expressly and definitely rendered by judicial authority, it has always been so constructively. I prefer its direct avowal to constructive recognition, and therefore join in the conclusion of my associates in its constitutionality.

Here we divide: I think that the Court below erred in rejecting proof of the uniform custom of all the banks of the District of Columbia, going to show that special relation of depositors to the bankers in the District was to receive back their deposits in kind; coin in return for coin deposited, and bank paper in return for bank paper deposited. The uniform custom of the banks of the District constitute a part of the law of the contract of the District, and the plaintiffs had a right by their dealings with these defendants (they having been proved to be bankers in the District), to show what that custom was, and when shown, such proof would of itself, and unaided by the express stipulations of the parties, have created between them the rela-

tions which the custom established. The express stipulations of the parties concurring with this established custom, the parties had a right to the benefit of that custom in further enlightening their relations.

In the rejection of this testimony, I think the Court below erred. I pass now from the question of proof to the main question in the case, which will be found involved in the following instructions of the Court, to wit:

"If the jury find from the evidence that the defendants were bankers in the years 1861 and 1862, and that the coin mentioned in the declaration was deposited with said defendants, as bankers, to be repaid in coin, said deposit created a debt from the defendants to the plaintiffs, which could be discharged by a payment or offer to pay the same in legal tender notes, and if the jury further find that said tender was made, the plaintiffs were not entitled to recover in their action."

These instructions bring me to the consideration of the office and effect of the act of Congress of February 25, 1862, upon the rights of the parties under this contract. That statute provides that "treasury notes shall be receivable in payment of all taxes, internal duties, excise duties, and demands of every kind due to the United States except duties on imports and of all claims and demands against the United States of every kind, except for interest upon bonds and notes which shall be paid in coin, and shall be lawful money and a legal tender in payment of all debts, public and private, within the United States except duties on imports and interest as aforesaid."

The clause "legal tender upon all debts, public and private" is selected as the text by the authority of which the contract under consideration is not to be satisfied in kind but legal tender currency, dollar for dollar, to the amount of the deposit. The first objection to this conclusion is that the parties intended no such thing, and that the parties had the right to determine the point if the subject of

the contract and the competency of the party permitted them to make it. The contract which they intended to make, and which they did make, was widely different in value from the one sought to be enforced by such construction of the law. The *language* of the law is "all debts public and private." The *meaning* of the law is "all liquidated indebtedness, public and private." It could never have been designed to break up the expressly stipulated value of a contract. To give it such construction would be to assume the right in the legislature to impair and invalidate the contract which is prohibited by the Constitution. This law does not affect to pronounce what the value of a contract shall be, but when such value is ascertained how it shall be satisfied. The term "indebtedness" in the sense of the statute has no significance until the amount of indebtedness is arrived at by the value fixed to the contract by the parties.

In the act of the 25th of February, 1862, Congress created a special currency, special in its relations to the obligations of and indebtedness to the Federal Government, giving it the office of satisfying debts and taxes, and prohibiting it in the satisfaction of duties and interest upon one class of its bonds, reserving to itself the right to be paid in coin as a distinguished currency, and taking upon itself the obligations to pay in coin as a distinguished currency. Can it be claimed by any fair use of logic that the Government retained to itself the right to make this distinction for itself and withhold it from the citizen? The very provision that required the duties to the Government to be paid in gold, compelled the citizen to acquire the gold to make the payment, and if the right to receive it is established under the law, the right to purchase gold for the purpose of paying it upon duties is established under the law. The practical effect of taking away the right of the party to contract for the purchase and sale of gold would be to defeat the purpose of the Government to collect their revenues in gold.

The moment that the citizen ascertains that his contracts in relation to gold were void, gold instead of making its appearance in the banks and market places of the nation would find its way into the dark holes of the earth, available to nobody.

That Congress recognized a distinction in value between the coin and paper currencies of the country, and the rights of parties to contract with reference to that distinction, is manifest not only in the act making treasury notes a legal tender, but in all the contemporary legislation upon the subject.

On the 3d of March, 1862, six days after the passage, the same Congress enacted that on all contracts for the purchase or loan of coin, or upon security of any certificate, or other evidence of deposit, payable in gold or silver coin, there should be a Government stamp fixed; otherwise, void. (Vol. 12, United States Statutes, pp. 719, 729).

Afterwards, on the 17th of March, 1862, twenty days subsequent, they authorized the Secretary of the Treasury to purchase coin "at such rates and on such terms as he may deem most advantageous." U. S. Statutes, Vol. XII, p. 370, sec. 1.

These acts recognize the distinction of value in the two species of currency, and authorized the Secretary of the Treasury to enter the market for purchase, with discretionary power as to premium. If the Secretary of the Treasury had the right to make contracts, discriminating between the value of the two species of currency, the citizen inherited the same right under the operation of the law.

This view of the subject leaves the real value of the contract and the right of the parties to make it unimpaired.

The argument and authorities so ingeniously and ably presented by the counsel of the defendant in conflict with this view do not appear to me to be addressed to the case at issue. They contemplate a general indebtedness under the implications of the law, and in that connection only,

they are good authority and good argument. The proposition that a general depositor of money in a bank by the act of his deposit, and by the construction of the law, loans his money to the banker is true, and if nothing supervened to change the relations of the parties, the law would satisfy the indebtedness in legal tender notes in the nominal amount of the deposit. But this is not the case at issue. The parties supervened with a special contract which they have a lawful right to make, and with the interposition of such contract they changed the current of their rights under the law from an implied to an expressed condition. The contract in this case makes the deposit of the plaintiffs with the defendants the equivalent of a special deposit. The right which the law implies in a special deposit to receive back that which the party has deposited, or its value in the event of refusal if secured by the express terms of this contract, and to judge otherwise is to impeach the power of the parties to make a contract, which is not attempted, and if it had been could not have been successful.

Thus I have briefly expressed my opinion which has brought me to the satisfactory conclusion that the instructions of the Court were erroneous, and that the judgment of the Court below should be reversed; and the plaintiffs ought to be permitted to recover the value of their contract.

## WILLIAM H. SPALDING ET AL.

vs.

## ELISHA D. HALL ET AL.

1. A tenancy at will cannot arise in the District of Columbia without an express contract to that effect. Act of July 4, 1864.
2. Prior to July 4, 1864, where the tenant held over by consent, given either expressly or constructively, after the determination of a lease for years, this was a tenancy from year to year. In this District such tenancies, if they existed on the 4th of July, 1864, cannot be terminated by a notice of thirty days, but require a notice of six months to be given prior to the expiration of the yearly tenancy.
3. The language of the first section of the Act of July 4, 1864, declaring "that the holding of lands or tenements by contract or lease, the terms of which have expired," &c., is to be construed as if it read, "the term of which has expired."
4. What would have been a tenancy from year to year before the passage of the Act of July 4, 1864, must now "be deemed and held to be" a tenancy at sufferance, and may now be terminated by a notice, in writing, of thirty days, served upon the tenant.
5. All tenancies arising in the mode mentioned in the first section of the act, and continuing after its passage, can only be terminated in the manner prescribed by the law as it existed prior thereto, and when so terminated the landlord may proceed against the tenant to recover possession under the provisions of the second section of the act.
6. The tenancy at sufferance mentioned in the first section of the Act of July 4, is "a holding by contract or lease, the terms of which have expired;" viz., a holding by the express or implied assent of the landlord, but the common law tenancy at sufferance is a holding over *by wrong* after the determination of the tenant's interest, that is to say, a holding in opposition to and in defiance of the will of the landlord. In the first case a thirty days' notice to quit is necessary before the tenant can be proceeded against under the second section of the act, but in the latter case proceedings may be instituted under that section at once and without notice; the meaning and intent being, that whenever the tenancy ends, if the tenant does not quit the premises, the landlord may institute forthwith and without notice, this summary proceeding to obtain possession.
7. The tenancy ends when the period for which the premises are leased expires. If the parties make no agreement as to the length of time for which the premises are leased, the tenancy may be ended by a notice of thirty days, if such tenancy was created subsequently to the 4th of July, 1864. If it was created before that



time, and is still subsisting, it can be ended only in the manner prescribed by the law as it existed before the passage of the act.

8. This summary remedy to recover possession is extended to all persons who, by the act of the lessor or by operation of law, are placed in the same relation to the tenant as the original lessor, to wit, the grantees, assignees, devisees or heirs-at-law of the lessor.
9. Therefore, where A obtains from the owner of the premises a lease thereof, to commence at the expiration of B's tenancy, A cannot avail himself of the provisions of the act, to recover the possession from B, who holds over after the expiration of his tenancy.

Law. No. 1209. Circuit Court. Decided November 21, 1864.

APPEAL from a justice of the peace in a landlord and tenant proceeding.

The defendants, Hall and Waters, were, as tenants of Mrs. Scott, in possession of a house in this city, for the unexpired term of a lease, ending June 30, 1864. On the 16th of June of the same year, Mrs. Scott executed to Spalding and Rapley a five years lease to commence July 1, 1864. Hall and Waters received no notice to quit and continued to hold possession after the expiration of their term. Thereupon, on August 3, Spalding and Rapley instituted proceedings against them to obtain possession under the Act of July 4, 1864, before a justice of the peace. Judgment for possession having been rendered against the defendants, an appeal was taken to the Circuit Court.

MR. WALTER S. COX, for plaintiffs.

MESSRS. BRADLEY & BRADLEY, for defendants.

MR. JUSTICE OLIN delivered the opinion of the Court:

The facts in this case involve the true construction and meaning of the first and second sections of the act entitled "An act to regulate proceedings in cases between landlord and tenant," passed July 4, 1864.

I will proceed to give briefly my construction of the statute. I am not insensible, I trust, to the vast importance of this statute to the people of this District, and that its provisions be clearly understood both by landlords and tenants, and thus enable them to act understandingly in reference to this subject.

The first section provides that after the passage of the

act—that is, after the 4th of July, 1864, no tenancy at will shall arise or be created without an express contract to that effect. A tenant at will is “one who holds lands or tenements let to him by another at the will of the lessor.” 2d Bl. Com., 145; 4th Kent Com., 110.

But this definition gives a very imperfect idea of the rights and obligations of a landlord and tenant, between whom a tenancy at will subsists. A tenancy at will arose in every case where one man leased lands or tenements to another, and no fixed period of time was agreed upon at which the occupancy thereof should cease.

I cannot better explain the nature of such a tenancy than by quoting from the 4th Volume of Kent's Commentaries, pp. 111, 112.

Speaking of estates at will, he says: “It was determined very anciently by the common law, and upon principles of justice and policy, that estates at will were equally at the will of both parties, and neither of them was permitted to exercise his pleasure in a wanton manner, and contrary to equity and good faith. The lessor could not determine the estate after he had sowed and before he had reaped, so as to prevent the necessary egress and regress to take away the implements. The possession of the land on which the crop is growing continues in the tenant until the time of taking it arrives. Nor could the tenant, before the period of payment of the rent arrived, determine the estate so as to cut off the landlord from his rent. Estates at will in the strict sense have become almost extinguished under the operation of judicial decisions. Lord Mansfield observed that an infinite quantity of land in England was holden without lease. They were all, therefore, in a technical sense, estates at will; but such estates are said to exist only notionally, and when no certain term is agreed on they are construed to be tenancies from year to year, and each party is bound to give reasonable notice of an intention to terminate the estates.

The language of the books now is, that a tenancy at will cannot now arise without express grant or contract, and that all general tenancies are constructively tenancies from year to year. If the tenant holds over by consent given either expressly or constructively, after the determination of a lease for years, it is held to be evidence of a new contract without any definite period, and is construed to be a tenancy from year to year. The moment the tenant is suffered by the landlord to enter on the possession of a new year, there is a tacit renovation of the contract for another year, and a half's year's notice to quit must be given prior to the end of the term."

I have thus quoted at length this exposition of a tenancy at will, or, more properly, a tenancy from year to year, because practically we have no tenancies at will, strictly speaking, and because I find a vast amount of real estate is now held in this District by that tenure known as a tenancy from year to year. Such tenancies existing on the 4th of July last, cannot be terminated by a notice of thirty days but require a notice of six months to be given prior to the expiration of the yearly tenancy.

The first section further provides that an occupation, possession or holding of any real estate without express contract or lease shall be deemed to be a tenancy by sufferance, and that the holding of lands or tenements by contract or lease the terms (it means term) of which have (has) expired shall be deemed and held to be a tenancy by or at sufferance.

We have thus two species of tenancies mentioned in this first section, one of which is described to be a tenancy at will, and the other it is declared shall be, "deemed and held to be" a tenancy at sufferance; and those tenancies thus defined, arising in the way mentioned in this first section after the 4th of July, 1864, may be terminated or put an end to by a notice in writing of thirty days served upon the tenant, &c. All tenancies arising in the mode men-

tioned in this first section, and continuing after the 4th of July, 1864—that is, after the passage of the act in question—can only be terminated in the manner prescribed by the law as it existed prior to the passage of the act of July 4th, and when so terminated the landlord may proceed against the tenant to recover possession according to the provisions of the second section of the act.

I may remark here, that a tenancy arising or created in any of the modes mentioned in the first section of the act would not, in the absence of that act, be held either a tenancy at will or at sufferance, but simply a tenancy from year to year, and would have required a notice of six months to terminate it.

The argument has been ingeniously pressed upon the Court, that because the act provides that a tenancy arising or created in the way mentioned therein, shall be deemed and held to be a tenancy at sufferance, which could only be terminated by a notice of thirty days, it followed that a tenant by sufferance, properly so known before the passage of this act, could not be proceeded against under the provisions of the second section without first having been served with a thirty day's notice to quit. Such a construction of this statute would nullify the plain and express provisions of the second section of the act, and deprive the statute of all its remedial character.

The only embarrassment in the construction of this first section arises in the use of the language, that where the holding is by contract or lease, the terms of which have expired it shall be deemed and held to be a tenancy at sufferance. Now, prior to the passage of this act, a tenancy at sufferance arose, or was created in one way only. "A tenant at sufferance," says Blackstone, "is one that comes into the possession of land by lawful title, but holds over by wrong after the determination of his interest." (See 2 Bl.

Com., 150; 4 Kent's Com., 116; Co. Litt., 57 b.) Such a tenant at common law had no estate in the premises he held, and was entitled to no notice to quit. The landlord might enter upon the premises and remove him and his goods therefrom, and no action of trespass could be maintained against him for so doing.

It will be seen at a glance, therefore, the distinction between the tenancy mentioned in the first section, and described as a "*holding by contract or lease, the terms of which have expired,*" and a "*holding over by wrong* after the determination of the tenant's interest." The former, I think, means a holding over by the express or implied assent of the landlord, and would, in the absence of the present statute, constitute a tenancy from year to year. The latter is a mere wrongful holding in opposition to and in defiance of the will of the landlord. The difference between a holding over and a wrongful holding over is too manifest to require illustration.

This construction of the first section harmonizes the first and second sections, and makes each consistent with itself and with each other.

The second section proceeds to enact, in substance, that when a tenant holds possession without right, after the estate is determined by the terms of the lease by its own limitation, that is where, by the agreement of the parties, the tenancy is to end on a particular day, and the tenant hold over, the landlord may do what? Give notice? No. He may, on written complaint on oath to a justice of the peace, have a summons issued, &c. This section also provides that when the tenant holds over after his estate has been determined by a notice to quit or otherwise, the landlord may make complaint, &c. In other words, the manifest meaning and intent of the second section is, that whenever the tenancy ends, if the tenant does not quit the premises, the landlord may institute forthwith this summary

proceeding before a justice of the peace to obtain possession. The tenancy ends with the period for which the premises are leased. If the parties make no agreement as to the length of time for which the premises are leased, the tenancy may be ended by a notice of thirty days, if such tenancy was created subsequently to the 4th of July, 1864. If it was created before that time, and is still subsisting, it can be ended only in the manner prescribed by the law as it existed before the passage of the act last mentioned.

One other question of some importance is raised in this case, as to what person or persons are entitled to resort to this summary proceeding to recover the possession of real estate. The first section uses the words "landlord and tenant," but the second section drops the word landlord and says, "on written complaint on oath of the *person entitled to the premises*," application may be made, &c. If this language be understood in its broadest acceptation, it would seem to imply that any one who had a legal title to the premises held by the tenant, might institute this summary proceeding to recover possession, whether that title was derived from the actual landlord or from some other source. Obviously, that cannot be the intent and meaning of this language; for, if so, it would at once subvert the common law action of ejectment, and substitute this summary proceeding in its place. The use of the words "*person entitled to the premises*," instead of the word "landlord," as in the first section, evinces an intention on the part of the legislature to extend this summary remedy beyond the actual lessor or landlord.

The true intent and meaning of the legislature was (I think) to extend this remedy to all persons who, by the act of the lessor or by operation of law, are placed in the same relations to the tenant as the original lessor, to wit, the grantees or assignees, devisees and heirs-at-law of the lessor.

If this construction of the statute be the true one, it fol-

lows that these complainants cannot institute this summary proceeding against the defendants in this case. They are not grantees, devisees, or heirs-at-law of the lessor of the premises in dispute. They certainly are not the landlords of these defendants. Before the expiration of the term of the tenants now holding over, the plaintiffs or complainants obtained from Mrs. Scott, the lessor of the defendants, a lease of the premises for the term of five years, to commence at the expiration of the defendant's tenancy. No relation, therefore, of landlord and tenant ever subsisted between these parties by express contract or by implication of law. This exposition of the statute will confine its provisions to what is its declared purpose, viz., to regulate proceedings in cases between landlord and tenant.

*In Re* JOHN DUGAN.

---

1. A purely legislative power cannot be delegated by Congress.
2. The Act of March 3d, 1863, conferred no power upon the President to suspend the privilege of the writ of *habeas corpus*. He derives that power directly from the Constitution itself.
3. The power to suspend this writ is not given to Congress; it rests, under the Constitution, with the President alone.

Decided January 24, 1865.

HEARING on *habeas corpus* in the General Term in the first instance.

THE FACTS are sufficiently stated in the opinion.

MR. J. H. BRADLEY, for the petitioner.

MR. JUSTICE OLIN delivered the opinion of the Court.

A writ of *habeas corpus* was issued in this case on the petition of Catherine Dugan, to cause to be brought before this Court the body of John Dugan, her husband. The petition states, in substance, that John Dugan was arrested some time in May last, by a subordinate of one Lafayette C. Baker, claiming to act under the authority of the War Department, and without any warrant or other process for the arrest of said Dugan; that he was committed to the prison known as the Carroll prison, where he has ever since remained; that the Secretary of War has never reported to this Court the arrest and imprisonment of the said John Dugan, as required by law; that two terms of the Criminal Court of this District have been held and finished, and two grand juries empaneled and discharged since the arrest and imprisonment of the said John Dugan, and that no presentment or indictment has been found against him, nor has he had any judicial or other examination. Upon the service of this writ, the person having the custody of the said



Dugan makes return thereto, that the body of John Dugan was in his custody; that he was arrested and imprisoned by the authority of the President of the United States, and that he does not produce the body of the said John Dugan, by reason of the order of the President of the United States endorsed upon said writ, to which endorsement reference is made.

The endorsement referred to is as follows:

"The within named John Dugan was arrested on and is imprisoned by my authority. This writ of *habeas corpus* is suspended, and the officer having Dugan in custody is directed not to produce his body, but to hold him in custody until further order, giving this order on your return to the Court.

"A. LINCOLN."

The question in this case arises on a motion for leave to traverse the sufficiency of the return to the writ.

It is contended by the learned counsel for the petitioner, that under and by virtue of the first and second sections of the Act of Congress "relating to *habeas corpus* and regulating judicial proceedings in certain cases" passed March 3, 1863, the said John Dugan is entitled to a discharge from his imprisonment. Those two sections are as follows:

"That during the present rebellion the President of the United States whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case, throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled in answer to any writ of *habeas corpus* to return the body of any prisoner or persons detained by him, by the President, but upon the certificate, under oath of the officer having charge of any one so detained, that such person is detained by him as a prisoner under authority of the President, further proceed-

ings under the writ of *habeas corpus* shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue.

SEC. 21. *And be it further enacted*, That the Secretary of State and the Secretary of War be, and they are hereby directed, as soon as may be practicable to furnish to the judges of the Circuit and District Courts of the United States and of the District of Columbia, a list of the names of all persons, citizens of States in which the administration of the laws has continued unimpaired in the said Federal Courts, who are now, or may hereafter be, held prisoners of the United States by order or authority of the President of the United States, or either of said Secretaries in any fort, arsenal, or other place as State or political prisoners, or otherwise than as prisoners of war; the said list to contain the names of all those who reside in the respective jurisdictions of said judges, or who may be deemed by the said Secretaries or either of them to have violated any law of the United States, in any of said jurisdictions, and also the date of each arrest, the Secretary of State to furnish a list of such persons as are imprisoned by the order or authority of the President, acting through the State Department; and the Secretary of War a list of such as are imprisoned by the order or authority of the President, acting through the Department of War. And in all cases where a grand jury having attended any of said Courts having jurisdiction in the premises, after the passage of the act, and after the furnishing of said list as aforesaid, has terminated its session without finding an indictment or presentment, or other proceeding against any such person, it shall be the duty of the judge of said Court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment, be brought before him to be discharged. And every officer of the United States having custody of such prisoner is hereby directed immediately to obey and execute said judge's

order, and in case he shall delay or refuse so to do, he shall be subject to indictment for a misdemeanor, and be punished by a fine of not less than five hundred dollars and imprisonment in the common jail for a period not less than six months, in the discretion of the Court. *Provided however*, That no person shall be discharged by virtue of the provisions of this act until after he or she shall have taken an oath of allegiance to the Government of the United States, and to support the Constitution thereof, and that he or she will not hereafter in any way encourage or give aid and comfort to the present rebellion, or the supporters thereof. *And provided*, also, that the judge or court before whom such person may be brought, before discharging him or her from imprisonment, shall have power on examination of the case, and if the public safety shall require it, shall be required to cause him or her to enter *into recognizance* with or without surety, in a sum to be fixed by said judge or court to keep the peace and be of good behavior towards the United States and its citizens, and from time to time, and at such times as such judge or court may direct, appear before such judge or court to be further dealt with according to law, as the circumstances may require. And it shall be the duty of the District Attorney of the United States to attend such examination before the judge."

The third section of the act provides, in substance, that when any person thus imprisoned has been indicted for any offense which by the existing laws is bailable, the judge may let such person to bail; and it further provides that "in case the Secretaries of State and War shall for any reason refuse or omit to furnish the said list of persons held as prisoners as aforesaid, at the time of the passage of this act, within twenty days thereafter, and of such persons as hereafter may be arrested within twenty days from the time of the arrest, any citizen may, after a grand jury shall have terminated its session without finding an indictment or presentment, as provided in the second section of this

act, by a petition alleging the facts aforesaid touching any of the prisoners so as aforesaid imprisoned, supported by the oath of such petitioner, or any other credible person, obtain and be entitled to have the said judge's order to discharge such prisoner on the same terms and conditions prescribed in the second section of this act: *Provided, however*, That the said judge shall be satisfied such allegations are true."

These are all the provisions of the sections of the 3d of March, 1863, which have any bearing upon the question presented for our consideration.

It requires but a casual examination of the first, second and third sections of this act to perceive that the question in this case presented for our consideration, whether the power to suspend the privileges of the writ of *habeas corpus* is under the Constitution an executive power to be exercised by the President of the United States in the exigencies therein mentioned; or whether it is a legislative power vested in Congress alone.

A question of deeper interest or more grave importance has seldom been presented to the consideration of any court. It is quite apparent that if the power to suspend the privilege of the writ of *habeas corpus* is conferred upon the president by the first section of this act, the exercise of that power is limited in the manner prescribed in the second and third sections of the same act; the first section providing that the president may in all cases during the existence of this rebellion, when in his judgment the public safety may require it, suspend the privilege of the writ, and the second and third sections providing that of any person be arrested by authority of the president and imprisoned for the period of twenty days, and after a grand jury having jurisdiction of the offense with which the prisoner is charged, shall have been empaneled and discharged without finding an indictment or presentment against the person so imprisoned, such person shall be entitled to the writ

of *habeas corpus*, and be discharged from imprisonment, unless in the opinion of the judge or court before whom the prisoner is brought, the public safety may require such prisoner to enter into recognizance, &c., to keep the peace and be of good behavior towards the United States and its citizens. In short, the first section declares that the president shall have power to suspend the privilege of the writ in all cases, and the second and third sections declare that under the circumstances mentioned therein the privilege of the writ shall not be suspended. By every rule of interpretation the second and third sections of the act must be held to qualify the first, and provide that under the circumstances mentioned in the second and third sections, the privilege of the writ shall not be suspended. The question then recurs, did the act of Congress of the 3d of March, 1863, confer upon the president the power to suspend the privilege of the writ of *habeas corpus*?

We are of opinion that it did not, for the following reasons:

If it be conceded that the power to suspend the privilege of the writ of *habeas corpus* is by the Constitution of the United States conferred upon Congress, and is purely a legislative power, it seems quite clear to us that Congress cannot delegate the exercise of that power to any other Department of the Government.

The provision of the Constitution is: "The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." If this be a legislative power, is it not manifest that upon Congress alone is *devolved the duty and responsibility of judging when the public safety requires the exercise of that power?* The great fundamental idea lying at the foundation of the Federal Constitution is a clear and well defined division of the powers of Government into three great departments, viz, executive, legislative, and judicial; each independent of the other, and yet so harmonized that each may act in

co-operation with the other in the execution of the powers conferred upon them respectively. To hold that either of these great departments of the Government may abdicate the powers conferred on it by the Constitution and delegate their exercise to some other department would subvert the great central idea of the Federal Constitution in respect to the division of these powers of Government. This idea of a division of powers was deemed by the founders of our Government the best to guarantee for the faithful and wise exercise of those powers, and the surest protection and security for the liberties of the citizens. The executive is charged by the Constitution with the duty of executing the laws, Congress with power of making the law, and the judiciary with the duty of interpreting them. As well might Congress assume to confer upon the Supreme Court of the United States the power to enact all necessary laws during the existence of the present rebellion as to confer upon the Executive Department the exercise of any purely legislative power.

The act of Congress in question does not suspend the privilege of the writ of *habeas corpus* in any case or profess to do so. It simply provides that "the President of the United States whenever, in *his judgment the public safety may require it*, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States or any part thereof." If this power to suspend the privilege of this writ be vested in Congress, the act of the 3rd of March is a perfect and complete abnegation of that power and attempts to delegate its exercise to the President. What would be thought of a Congress which should provide that the marshal of the District of Columbia might suspend the privilege of the writ of *habeas corpus* whenever in his judgment the public safety required it during the existence of the present Rebellion? Surely, if Congress can abdicate its legislative powers in favor of the President, it may do so in favor of any one else. It is not a question as to the

character of the agent to be selected, but whether any one can be selected at all.

We are not advised whether the question of the power of Congress to delegate the exercise of any of its legislative powers has ever been passed upon by the Supreme Court of the United States. The question has, however, not unfrequently arisen and been adjudicated by the highest judicial tribunals of several of the States, all having written constitutions formed upon the model of those of the general Government providing for a division of the powers possessed by the State into executive, legislative and judicial, and so far as we are aware, it has been uniformly held that a purely legislative power could not be delegated by the legislative to any other officer or body of men, or even be surrendered to the people, the source of all power by the theory of our Government.

We have thus far attempted to show that the act of the 3d of March, 1863, conferred no power upon the President to suspend the privilege of the writ of *habeas corpus*, even though it be conceded that the power to suspend the privilege of the writ is by the Constitution conferred on Congress alone as one of its undoubted legislative powers.

The remaining question to be considered in this case is, whether by the Constitution the power to suspend the privilege of the writ of *habeas corpus* is conferred upon the legislative or executive department of the Government.

The provision of the Constitution is as follows :

"The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of Rebellion or invasion, the public safety may require it."

The writ of *habeas corpus* is of common law origin, and it has been confirmed by various acts of the Parliament of Great Britain, and more especially by the 31st of Charles II, chap. 2d. It was a writ issued on petition, directed to the person having in custody any one imprisoned or restrained of his liberty, commanding him to produce the body of the

prisoner before the judge or Court, issuing the writ, "*with the day and cause of his caption and detention.*" And if in no legal or sufficient cause was made to appear for his imprisonment or detention he was of right entitled to be discharged from imprisonment.

If, on the contrary, it appeared to such judge or Court that there were reasonable grounds of suspecting the prisoner to be guilty of some offense, the prisoner was entitled to furnish bail if the offense was bailable, and be discharged from imprisonment; and if not bailable, he was entitled to a trial without arbitrary delay.

This exposition of the nature and province of the writ of *habeas corpus* will enable us to understand clearly what is meant by the provision of the Constitution above quoted, viz: "The privilege of this writ shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." That is, the right of the citizen to be discharged from imprisonment unless legal cause can be shown for his detention; the right to give bail if the offense charged be bailable, and if not bailable, the right to a speedy trial and without arbitrary delay. These are the privileges of the writ of *habeas corpus*, and the Constitution says this privilege may be suspended in times of rebellion or invasion, when the public safety may require it.

It will be observed that no intimation is contained in the provision before quoted as to which of the three great departments of the General Government is given the power to suspend the privilege of this writ.

It has been argued that from the collocation of this provision it may be properly inferred the power was designed to be conferred upon Congress. But this argument will be entitled to no weight when the history and origin of this provision is considered in the light of the few facts respecting it which have come down to us from the convention which framed the Federal Constitution.



It is known that shortly after the meeting of that convention Charles Pinckney, of South Carolina, drew up a "plan of a Federal Constitution." In the sixth article of that plan, and among the provisions relating to the powers proposed to be conferred upon the legislature was the following:

"All laws regulating commerce shall require the assent of two-thirds of the members present in each house. The United States shall not grant any title of nobility. The legislature of the United States shall pass no law upon the subject of religion, nor touching or abridging the liberty of the press; nor *shall the privilege of the writ of habeas corpus ever be suspended* except in cases of rebellion or invasion."

In this proposed provision, the idea is dimly shadowed forth that the suspension of the privilege of the writ was regarded by Mr. Pinckney as a proper power to be conferred on the legislature. We hear nothing further of this "plan for a Federal Constitution," so far as it related to the writ of *habeas corpus*. At a subsequent period of the session of the convention, Mr. Pinckney moved a number of propositions to be referred to a committee of the convention, and among them was the following:

"The privileges and benefits of the writ of *habeas corpus* shall be enjoyed in this Government in the most expeditious and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions and for a limited time not exceeding ——— months."

When this subject came up before the convention, Mr. Pinckney moved to fill the blank with the word "twelve." Mr. Rutledge is reported to have said that he was for declaring the *habeas corpus* inviolate. He did not conceive that a suspension could ever become necessary at the same time in all the States.

Thereupon Governor Morris moved as an amendment to

one of the articles pertaining to the judiciary, the following:

“The privilege of the writ of *habeas corpus* shall not be suspended, unless *where*, in cases of Rebellion or invasion, the public safety may require it.”

This motion was adopted by the convention; but the provisions of the Constitution, when adopted by the convention, were subjected to the criticism of a committee of style and arrangement, not however, empowered to alter the meaning of any provision adopted by the convention. By this committee the provision in question was amended by substituting the word “when” for the word “where,” and placed where we now find it—section nine of article one—in conjunction with various other provisions, all of which are either limitations of the power of the general Government or of the executive department thereof.

Such is believed to be the true history of the origin of the provision in respect to the writ of *habeas corpus* found in the Federal Constitution, and of the place it now occupies in that instrument. If this be so, it will, we think, readily be admitted that no argument can be adduced from its mere location in the Constitution in favor of its being designed as one of the legislative powers of the Government. On the other hand, a strong presumption to the contrary, we think, arises from the significant omission of the word legislative, as contained in Mr. Pinckney's resolution, and likewise from the fact that the provision was actually adopted by the convention as an amendment to that of the Constitution pertaining to the judiciary.

But probably, the usual argument relied on to show the provision in question to be a grant of legislative power, is drawn from the supposed analogy of the provision in question to the English constitution, which vests in Parliament the power to suspend the writ of *habeas corpus* or rather, the power to repeal the act known as the *habeas corpus* act. A

moment's reflection will serve to show that arguments drawn from such a source are often deceptive and fallacious. The Constitution of England however worthy it may be of the admiration so often expressed for it by great and good men, is nothing more or less than just what Parliament may choose to declare it to be. Ours is a *written* Constitution, conferring upon the Government certain defined and limited powers.

The sovereign of Great Britain in whom is vested the executive power, rules by the accident of birth, and by the theory of the English constitution, "can do no wrong." The executive power under our Constitution is vested in a President, elected by the people every four years, and like all other officers of the Republic, amenable to the law and liable to be removed and punished for every intentional violation of it.

It may not be inappropriate to give in this connection a summary of the powers vested in the sovereign of Great Britain, and of those vested by our Constitution in the President. We quote from a treatise of that eminent jurist, Horace Binney, upon the subject of the power to suspend the privilege of the writ of *habeas corpus* published in 1862. Speaking of the powers conferred by the English constitution on the sovereign of England he enumerates the following: "The exclusive right to declare war and to make treaties with foreign powers without the advice or consent of either branch of the legislature, the power to build ships and to regulate the navy; the power of calling forth the militia for any cause, which, in the king's judgment makes it expedient, the sole and exclusive power of appointments to office, both civil and military; the power of appointment to great offices in the established church; the power of conferring upon such subjects as the crown favors both rank and title and, hereditary authority as law-

makers in one branch of the legislature and the power of absolute veto upon any acts of parliament.

Contrast these powers with the summary given by the same learned author of those conferred upon the President:

"The President has no powers that can be abused or enlarged by himself, except with more danger to himself than to the country. Elected directly, or indirectly, by the people for a short term of years, unable to veto a law of Congress if two-thirds of each house shall concur in passing it against his advice, unable to make war, or to arm a soldier, or to call forth the militia for any purpose, or to build a ship, or to enlist a sailor or marine, unable to make a treaty unless two-thirds of the senators present concur, or to appoint an ambassador, minister, consul, judge, or any other officer without the advice and consent of the Senate."

These radical and distinctive differences alone may serve to show how dangerous might be the power to suspend the writ, "or the privilege of the writ of *habeas corpus*," in the hands of one, and how safe for the just liberties of the people it would be in the hands of the other, especially when the exercise of that power is limited to the cases of rebellion or invasion, and then only when the public safety requires such suspension.

The experience of over sixty years has taught us that the power to make laws, even under a written constitution prescribing the limits of legislation, is a formidable and vast one; that the power to interpret them and declare their obligation is scarcely less so, while the simple power to execute those laws would seem to be a comparatively inferior or subordinate one.

More than half a century's experience in the practical operation of our Government has dispelled all fear of encroachment upon the liberties of the citizen by the executive power; and it is only since the commencement of

this rebellion that such fears have been expressed chiefly by the open or covert enemies of the Republic.

Again, if we consider for a moment the nature of the power conferred by this provision of the Constitution, we think it will be found wholly incompatible with the legislative function, while it is eminently necessary and proper in aid of the executive power.

Bear in mind the meaning we have given of the provision in question. It would seem to imply the exercise of this power in respect to individual cases, each one depending on its own peculiar circumstances, concerning which Congress would have no means of judging, and by reason of its not being a permanent body, frequently no opportunity to judge at all.

The power granted, whether conferred upon the executive or Congress, is doubtless ample and sufficient to authorize either to declare the privilege of the writ suspended in any or all of the States of the Union; but such an exercise of authority would seem to be an abuse of power. For instance, individual cases may have occurred in the State of New York in which the suspension of the privileges of the writ was eminently proper, and yet it would be justly felt as oppressive and unnecessary to make the suspension applicable to all the loyal citizens of the State.

Again, the President is charged with the faithful execution of the laws, and by consequence is empowered to use every necessary and legal means in aid of their execution. Rebellion and invasion at once put an end to the peaceful operation of the laws. The executive power of the Government is first brought in collision, and is just made acquainted with the nature and extent of the danger threatening the Republic, and is best qualified to judge of the means requisite to be employed for its preservation.

The power to suspend the privilege of the writ of *habeas corpus* in time of rebellion and insurrection, when the pub-

lic safety may require it, is expressly given in the Constitution. The President is charged with the duty of seeing that the laws are faithfully executed. The Supreme Court has held over and over again, that the power to do an act necessarily includes the power to use any appropriate means to it. In case 4th Wheaton, 316, Chief Justice Marshall says: "The powers given to the Government imply the ordinary means of execution and the Government, in all sound reason and fair interpretation, must have the choice of the means it deems the most convenient and appropriate to the execution of the power."

The principle here announced applies with equal force to each of the three great departments of the Government. If this be so, why should not the President exercise the power to suspend the privilege of the writ of *habeas corpus*, especially if the exercise of that power be found by the President, as Commander-in-Chief of the Army, one of the most efficient and absolutely necessary means to be employed in the suppression of this rebellion.

The exigencies of this great rebellion within a few days after the 4th of March, 1861, forced upon the Executive Department of the Government the consideration of the question whether the President as Commander-in-Chief of the Army might exercise the power to suspend the privilege of the writ of *habeas corpus*. Acting under the advice of his cabinet, some of whom by common consent are among the most distinguished jurists of the country, he assumed the responsibility of suspending the privilege of the writ, and by so doing preserved to the Republic the possession of at least two most important fortresses.

At the extra session of Congress, calling to meet on the 4th of July, 1861, the President in his message communicated to that body the fact of the exercise of such power, and his reasons for it; and so far as we are advised, no complaint or exception was made by either House of Con-

gress as to its being an assumption of legislative power conferred by the Constitution upon Congress alone. The Act of the 3d of March, 1863, is, by no means, to be regarded as a protest against the right of the Executive Department of the Government to exercise the powers it assumed, but was enacted from "abundant caution" to justify such exercise of authority if, as claimed by some, the provision should be finally declared to be a grant of legislative power.

We now come to consider whether there is any authoritative adjudication as to whether the provision in question be a grant of legislative or executive power. So far as we are advised, there is absolutely none upon this subject.

We regard it as one of the chief glories of our form of Government that no citizen of the Republic, for upwards of seventy years, has provoked the exercise of the power to suspend the privilege of the writ of *habeas corpus*, and thereby obtain a judicial construction as to which department of the General Government is vested with the power in question.

In the case of *ex parte* Bolman Case, Chief Justice Marshall is reported to have used language which would imply that the power in question is vested in Congress; but the decision of that case did not involve the question before us, and of course could not have received that discussion and careful consideration which would entitle it to be regarded as authoritative. Had this question been presented for adjudication to that eminent judge, he doubtless would have brought to its consideration the unsurpassed powers of his intellect, and his great and varied learning, and whatever conclusion he had arrived at by common consent would have been regarded as an end of all controversy upon this subject. We need not add that no court feels constrained to follow the *obiter dictum* or casual remark of any judge not necessary to the decision of a case before him.

Story and Rawle, in their commentaries upon the Con-

stitution have apparently adopted the suggestion of Chief Justice Marshall in the case of *ex parte* Bolman, and regarded the provision in question as a grant of legislative power. However that may be, we think it is quite apparent from the operations contained in the respective works of these learned commentators upon this subject that little reflection or examination was given to the origin and nature of the power in question. They seem to have been misled by the supposed analogy between the provision contained in the Federal Constitution and the power claimed and exercised by the Parliament of England to suspend at its pleasure the act of *habeas corpus*.

The late and venerable Chief Justice Taney, in his decision of the case of *ex parte* Merriman, reported in the July number of the *Law Register*, announced certain doctrines which it is conceded are wholly at war with the views we have expressed, but they seem to us so directly and radically opposed to the opinion of the Supreme Court in the case of *Luther vs. Borden*, 7 Howard 1, delivered by the same learned judge, that it is hardly worth our while to attempt an answer to the reasoning contained in it. It is sufficient to say that if the principles announced in the case of *ex parte* Merriman be law, it is the duty of the Supreme Court, on the first fitting occasion to reverse their decision in the case of *Luther vs. Borden*.

To hold that after thirteen States of the Federal Union had abjured their allegiance to the Government, and organized an armed rebellion for its dismemberment and overthrow, that the only power conferred by the Constitution and laws upon the President, was to act as an assistant of a United States marshal heading a *posse comitatus* in an attempt to serve legal process, would seem to require neither comment or answer.

The views above expressed renders it unnecessary for us to answer in detail the very able and learned argument of



the counsel for the petitioner. We are not insensible, I trust, to the vast importance of the question presented for our consideration. If the conclusion at which we have arrived be erroneous, we have the consolation of knowing that our error can be corrected by an appellate tribunal, to whose decision we shall bow with respectful reverence.

Perhaps the experience of the last four years has prejudiced our judgment. We, together with a vast majority of the loyal people of the Republic, have regarded every possible vigorous and legal exercise of executive power for the suppression of the existing rebellion, not only as the legal right, but the solemn and sworn duty of the President.

*The return to this writ is held to be sufficient, and the writ must be dismissed.*

## BENJAMIN H. CHEEVER

vs.

## JESSE B. WILSON ET AL.\*

1. Up to the year 1860 no law existed in the District of Columbia authorizing a divorce from the bond of marriage for any cause whatever, although in a proper case the Court had power to decree a separation and alimony.
2. A person's domicile is that place in which he has taken up his permanent residence, and to which, when he is absent from it, he has the intention of returning.
3. A domicile once acquired is never lost until a new one is gained.
4. During coverture the wife has no power to change her domicile, except where she has been abandoned by her husband, and he has taken up a new domicile for himself in another jurisdiction; in such case she may choose the old or follow him into his new domicile for the purpose of instituting a divorce suit.
5. But beyond such choice she may not go. She will not be permitted to select that particular jurisdiction whose laws and whose administration of them, she may find best suited to her purpose and make that her domicile, into which she may compel her husband to come to answer her complaint.
6. In a question of divorce there is no difference whether the decree has been pronounced by a judicial tribunal in a foreign country or by a court in one of the States of the Union; in either case the decree is valid if the Court had jurisdiction, and void if it had not.
7. A divorce rendered in Indiana divorcing parties whose legal domicile is in this District is void for want of jurisdiction, although the defendant appeared and submitted to the jurisdiction of the Court.
8. Such a divorce cannot be recognized in any proceeding in this Court which may be based upon it, even though all parties agree to recognize it as valid.

In Equity No. 1393. Rules 5. Decided March 24, 1863.

BILL to enforce the provisions of a foreign decree of divorce.

THE FACTS are stated in the opinion.

MR. THOMAS WILSON, for complainant.

*Res judicata.* A judgment or decree of a court of competent jurisdiction is conclusive, wherever the same matter is

---

\* Reversed by the Supreme Court of the United States, see Cheever vs. Wilson, 9 Wall., 108.

brought in controversy between the same parties or privies. *Miles vs. Caldwell*, 2 Wall., 35; *Hopkins vs. Lee*, 6 Wheat., 109; *Parish vs. Fenis*, 2 Black, 606; *Walden vs. Bodley*, 14 Pet., 156; *Thomas vs. Lawson*, 21 How., 332; *Ableman vs. Booth*, 21 How., 506; *Thompson vs. Roberts*, 24 How., 233; *Aspden vs. Nixon*, 4 How., 467; *Steam Packet Co. vs. Sickles*, 24 How., 333; *Warburton vs. Aken*, 1 McLean, 460; *Bissell vs. Briggs*, 9 Mass., 462.

"If the judgment is conclusive in the State where it was pronounced, it is equally conclusive everywhere" in the Courts of the United States. *Christmas vs. Russell*, 5 Wall., 302; *Story, Const.*, sec. 313, 3d ed.

The Courts of every country are the exclusive judges of there own jurisdiction, so far as it depends on their municipal law. *Rose vs. Hinely*, 4 Cranch, 241; *Grignon vs. Astor*, 2 How., 339.

In Indiana the decree is conclusive.

Whenever the wife is plaintiff in a divorce suit, it is the burden of the allegation that she is entitled, through the misconduct of her husband, to a separate domicile. If she fails to prove this, she fails in her cause; if she does prove it, she establishes her cause. 2 Bish. Mar. & Div., 126, sec. 125.

A wife may establish separate domicile from her husband. *Ditson vs. Ditson*, 4 R. I., 87; *Hanberry vs. Hanberry*, 29 Ala., 719.

A wife may have separate domicile from her husband for purpose of divorce. *Story Conf. L.*, 285, n.; *Jenness vs. Jenness*, 24 Ind., 355.

Judge Story says: "The doctrine, now firmly established in America, is: "That the law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to decree a divorce. *Story Conf. L.*, 287, sec., 230; see also *Bish. Mar.*, n. to sec., 142; *Harding vs. Allen*, 9 Me., 140.

The protection of innocent parties and the purity of pub-

lic morals require that divorces lawfully pronounced in one jurisdiction \* \* \* should be recognised as operative and binding everywhere." *Harrison vs. Harrison*, 19 Ala., 499; *Tolen vs. Token* 2 Blackf., 407; *Maguire vs. Maguire*, 7 Dana, 181; *Wall vs. Williamson*, 8 Ala., 48; *Wall vs. Williams*, 11 Ala., 826; *Fellows vs. Fellows*, 8 N. H., 160; *Pawling vs. Bird*, 13 Johns., 192; *Mansfield vs. McIntire*, 10 Ohio, 27; *Cooper vs. Cooper*, 7 Ohio, 2d Vt., 238; *Gleason vs. Gleason*, 4 Wis., 64; *Hubbell vs. Hubbell*, 3 Wis., 662; *Ditson vs. Ditson*, 4 R. I., 87.

Apart from the question of divorce, it is submitted that the money part of the decree in the Indiana court is conclusive in this case.

MR. WALTER S. COX, for defendants.

1. The decree of divorce was void for want of jurisdiction.

The courts of Indiana had no jurisdiction to decree the divorce of any but *bona fide* domiciled citizens of that State. Bishop on Marriage and Divorce, sec. 721 and seq.; Story's Conflict of Laws, sec. 228-230; *Chase vs. Chase*, 6 Gray, 157, *Jackson vs. Jackson*, 1 Johns. Rep. 424; *Dorsey vs. Dorsey*, 7 Watts; *Bradshaw vs. Heath*, 13 Wend., 407-422; *Hinds vs. Hind*, 1 Iowa R., 36.

The question of *bona fide* domicile is one of fact. It is clear, from the proof, that Mrs. Cheever went to Indiana for the sole purpose of procuring this divorce, with no intention to reside there longer than was necessary for that object. She went in February, the decree was obtained in August, and she returned in September as soon as she had recovered from a sickness. She was never there, as far as appears, before or after that period. See her deposition in supplemental record. The *animus manendi*, which is essential to make a *bona fide* domicile, was wanting.

Besides, during her covertures, she could not have acquired a domicile in Indiana. The former domicile of both

parties was Washington. It is so shown in their marriage settlement.

It is a general rule, that the husband's domicile is that of the wife, and she cannot acquire a different one during coverture. See cases above and *Pennsylvania vs. Ravenel*, 21 How., S. C., 110.

It would be found that the only exceptions are, that if the husband abandons her and acquires a different domicile, she may retain the domicile where she was abandoned and seek her remedies there, or she may go back to her friends in her original domicile and have redress there. See cases cited in Bishop on Marriage and Divorce, sec. 730. She cannot select a domicile anywhere, with reference to the laxity of its laws on this subject.

2. If there was jurisdiction of the person, there was none to affect the wife's property, even through the persons, under the laws of Indiana, which provide that where a divorce is decreed for the act of the husband, the wife shall be restored to her property as if he had died. (See Rev. Statutes of Indiana, of 18—, art. 48, ch. 4, sec. 18.) In this case, the husband's desertion was the ground of the decree.

3. Even if there was jurisdiction, the decree was unjust, and the courts of this District are not bound to carry it into execution. It does not establish a prior indebtedness or title. It merely undertakes, in the exercise of judicial discretion, to *create* rights of property anew. Our courts are called on in this suit to enforce that decree. They are not bound to do so. 3 Daniel's Ch. Practice, 1869.

And if not bound, they ought not to do so. The decree is without a parallel. It divorces on the ground of the husband's desertion, and yet gives him a third of the wife's property, to support the children whom he was bound, at common law, to support himself. It, in effect, awards him alimony for his own offense of desertion. By his own testimony, it appears that he has been supporting the three

children with him, and, therefore, has been able to do it, at great expense. Besides, if the arrearages of rents are allowed him, as claimed, it takes away the wife's whole income for years to come, leaving her nothing for the support of herself and youngest child. The decree undertakes to give away the wife's property to the children when they become of age, which two of them have become since the decree, and further undertakes to dispose of the fee-simple after her death.

MR. JUSTICE WYLIE delivered the opinion of the Court;

This suit was instituted on the 28th day of June, 1858, for the purpose of enforcing a decree of the Circuit Court of Madison County, Indiana, granting a divorce, a *vinculo matrimonii*, between Annie J. Cheever and Benjamin H. Cheever, and disposing of the children and certain property of the parties as is therein set forth.

Annie J. Cheever, shortly after obtaining the Indiana divorce, married one Louis Worcester, who has since died, which explains her appearance in this suit by that name.

The property in question is situate in this city, and was her sole and separate estate for life, with remainder in fee to her children by Cheever under the will of her father, followed by a marriage settlement to which Cheever was a party; and, at the institution of this suit, was and still continues to be in the tenancy of the defendant Wilson, under a lease from Mrs. Cheever and her trustee and mother, Mrs. Hughes.

The marriage settlement is dated the 6th of September, and the marriage between the parties was solemnized on the 8th of the same month, 1842.

The parties resided in this city and lived in harmony till the month of December, 1854, and four children were born to them, namely: John T. H., Caroline P., Benjamin H., Jr., and Victoria I. The first named has reached his majority, and the second very nearly her majority, since the

present suit was brought. The other two are now respectively, about the ages of fifteen and twelve.

In the month of December, 1854, "a disagreement" arose between Cheever and his wife, which resulted in his leaving her. He still continued to maintain his domicile, however, in this District, but the children, or at least some of them remained with their mother.

The property in question being vested in Mrs. Sarah T. Hughes, the mother of Mrs. Cheever, for the sole and separate use of the latter, Mrs. Cheever continued to collect its rents and profits.

At that time, and until the year 1860, no law existed in the District of Columbia to authorize any court to grant divorce from the bond of marriage for any cause whatever; although, in a proper case, the Court had power to decree a separation and alimony.

It is manifest, from the evidence in this cause, that Mrs. Cheever was not content to accept the remedy so provided for her case by the laws of this District.

She, therefore, in February, 1857, proceeded to the State of Indiana, accompanied by one of the children, and took up her "residence," as she calls it, in the City of Indianapolis.

The only evidence we have in this record as to the declared purpose of her departure is that given by Wilson, her friend and tenant, and now co-defendant in this cause, who says, "I understood that she went there to get a separation from her husband, but I didn't know, when she first went, what she had gone for."

As both the parties to that proceeding have seemed unwilling to allow the validity of the Indiana decree to be called into question, the interrogatory which brought out this answer from Wilson, doubtless escaped from counsel inadvertently, for the subject was immediately dropped when it was seen to what results a further inquiry might lead.

In May, Mrs. Cheever returned to Washington, remained several weeks transacting business in relation to her property, and in June again proceeded to Indianapolis.

On the 16th of June her petition was filed in the District Court of Marion County, praying a divorce from the bond of the marriage with her husband, Benjamin H. Cheever.

At the same time (as the record certifies) "said attorneys" also filed the affidavit of "a competent person" that defendant was not a resident of the State of Indiana, and thereupon notice by publication was ordered to be given to defendant of the pendency of the suit.

The affidavit is not in the record, and we do not know who the "competent person" was by whom it was made, but there can be no doubt of the truth of the statement. Subsequently Mrs. Cheever filed her own affidavit that she was, at the time of bringing the suit and still was, a *bona fide* resident of Marion County, Indiana.

In what sense she interpreted the terms "*bona fide* resident" we have no means of ascertaining with certainty. The language itself is equivocal, at least to persons who are unacquainted with its interpretation by the Courts, and I doubt whether, even there, its meaning has been perfectly settled. Unless, however, we are to impute to the Legislature of Indiana a purpose to violate its obligations of comity to its sister States, and to claim for its judicial tribunals jurisdiction in cases over which such jurisdiction cannot be conceded, these terms must be understood as synonymous with domicile. And domicile has been correctly described as "the place in which a person has taken up his permanent residence, and to which, when he is absent from it, he has the intention of returning"—Burrill.

Domicile, once acquired, is never lost until a new one takes its place.

In the great case of *Somerville vs. Lord Somerville*, 5 Vesey, Jr. 787, the Master of the Rolls says: "The third



rule I shall extract is, that the original domicile, of origin is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile. I speak of the domicile of origin, rather than that of birth, for the mere accident of birth at any particular place cannot in any degree affect the domicile."

Few cases have been more ably and exhaustively discussed by counsel than this one, and the opinion of the Master of the Rolls has, ever since it was made, been looked to, both in England and in this country as settling the law on the subject of domicile, in almost every aspect in which it can be presented. See also a very interesting case in which this subject was discussed (*De Bonneval vs. De Bonneval*) in 6 Eng. Eccl. Rep., 502. In making her affidavit that she was a *bona fide* resident of Indiana, Mrs. Cheever evidently supposed that a temporary sojourn in the State was sufficient—that if she were there personally her residence was *bona fide*, so long as it lasted. She was strongly bent upon one object, and not to be baffled by ordinary obstacles. We all know, too, with how much astuteness of distinction the human mind will reason, to answer the objections of conscience, when the whole heart and soul and passions are enlisted in eager pursuit of a darling purpose.

It is certain that Cheever's domicile was not in Indiana, and there is no evidence that at the date of these proceedings in Indiana, or even to this day, it has ever been removed from this District.

And as to Mrs. Cheever, we have before us the evidence of her lease to Wilson, dated the 16th of July, 1857, precisely one month after she had commenced her suit for divorce in which she describes herself as "of the city of Washington."

After the divorce decree was obtained she returned to this city, but how long she remained does not appear. We have proof that in June, 1858, she had already been mar-

ried to Worcester, and that her domicile was then claimed by her to be in Kentucky.

But we hold the law to be perfectly settled both on principal and authority that, during coverture, the wife has no power to change her domicile. (See *Jackson vs. Jackson*, 1 Johns. Rep., 424; *Dorsey vs. Dorsey*, 7 Watts; *Pennsylvania vs. Ravenel*, 21 How. Rep., 110.)

This rule may be subject, however, to one qualification, if it indeed be a qualification, in the case where the wife has been abandoned by the husband, who has taken up a new domicile for himself in another jurisdiction.

In that case he shall not be permitted to take advantage of his own wrong in abandoning his wife; and for the purpose of her suit against him for divorce, she can have her choice either to follow him into his new domicile or sue him in the old.

But beyond this she may not choose. She will not be permitted to select from all the thirty-six States of the Union, to say nothing of foreign states, that particular jurisdiction whose laws and whose administration of them, she may find best suited to her purpose, and make that her domicile, into which she may compel her husband to come to answer her complaint by publication of notice in a newspaper.

I do not know that even in Indiana incompatibility of dispositions has yet been made a good ground for divorce *a vinculo matrimonii*; but it is said that such is the law in Prussia, and, if this Indiana decree can be sustained we shall be bound to recognize as valid whenever the case shall be presented, the decree of some Prussian court divorcing a husband and wife whose lawful domicile was here, and procured by the wife, perhaps, during a summer excursion, on which she has availed herself of the opportunity to obtain as valid and *bona fide* residence in Prussia, as Mrs. Cheever obtained for herself in Indiana in the spring of 1857.

For in questions of divorce there is no difference whether the decree have been pronounced by a judicial tribunal in a foreign country or by a court in one of the States of the Union.

In either case the decree is valid if the Court has jurisdiction, and void in neither without it.

In *Jackson vs. Jackson* (1 Johns. Rep., 424), the facts were almost identical with those in the case before us. The parties had been married in and resided in the State of New York. The wife, deeming herself ill used by her husband, and not being entitled to a divorce *a vinculo* for such cause in that State, proceeded to the State of Vermont, and there filed her bill in the Supreme Court for divorce, alleging the ill usage and bad temper of her husband towards her as the cause. The defendant appeared to the suit and made defense. The Court "upon hearing the allegations in the said petition contained, and the evidence adduced in support thereof, and the arguments of counsel," granted the divorce with \$1,500 alimony to the wife.

Subsequently she brought her action in the State of New York against the husband to recover the alimony given her by the Vermont decree.

The husband made defense that the Court in Vermont had not jurisdiction of the cause, notwithstanding he had appeared and submitted to the suit.

The Supreme Court of New York held the defense good, and that the Vermont decree was null and void, because at the time it was made the domicile of the parties was in New York, and that during coverture the husband's domicile was his wife's, and that she could not change it.

Chief Justice Savage, in referring to this decision, says, "In *Jackson vs. Jackson* both parties appeared, and, therefore, the Court had jurisdiction of the parties, but the divorce was held void, because there was no jurisdiction

over the subject-matter." 16 Wen. Rep., 407-422, Bradshaw *vs.* Heath.

In Dorsey *vs.* Dorsey (7 Watts, 349), a case now familiar to the profession from the remarkably able opinion of Chief Justice Gibson, the same doctrine is maintained in regard to the inability of the wife to obtain a domicile different from her husband's during the coverture.

The same principle is also asserted by the Supreme Court of the United States in a recent case. *Pennsylvania vs. Raevenel*, 21 How. Rep., 110.

In Barber *vs.* Root (10 Mass. Rep., 265), Sewell, J., in delivering the opinion of the Court, expresses himself on this subject with natural indignation, and declares, "I must be permitted to say the operation of this assumed and extraordinary jurisdiction is an annoyance to the neighboring States, injurious to the morals and habits of their people, and their exercise of it is, for these reasons, to be reprobated in the strongest terms."

The doctrine that domicile, actual and *bona fide*, can alone confer jurisdiction is said by Mr. Justice Story to be now the firmly established law in America. Wheaton, in his work on international law, asserts the same doctrine, and says, "this, of course, excludes such divorces as are obtained in fraudulent evasion of the laws of the State by parties removing into another for the sole purpose of obtaining a divorce." Bishop declares the same doctrine, and adds, "nor is this proposition at all modified by the fact that one or both of the parties may be temporarily residing within reach of the process of the Court, or that the defendant appears and submits to the suit. This is the firmly established doctrine in England and America. Bish. Marr. and Div., ch. 34, s. 721.

In England, until the passage of a recent act of Parliament, (20 and 21 Vict., ch. 85,) there was no power in the Courts to decree for any cause whatever, and the Courts would not recognize the validity of the decree of any foreign tribunal

professing to divorce a marriage which had been solemnized in that country.

In Lolly's Case, decided in the year 1812, by the twelve judges (1 Russ. and Ry. Ca., 236), this doctrine was maintained in all its breadth, in a case which appealed most powerfully for its relaxation. Lolly had married in England and afterwards removed to Scotland with his family, and there obtained a new and *bona fide* domicile. For a cause occurring in Scotland after his removal, one of the Courts there decreed a divorce from the bond of matrimony. He then returned to England and married the second time, for which he was indicted, tried and convicted of bigamy and sentenced to seven years transportation. The question of the validity of this sentence was in due form brought for decision before the twelve judges and they held the conviction right.

This doctrine, however, was resisted in the Scotch Courts with great firmness and ability, and was at length assailed in a powerful argument by Lord Brougham in the case of Warrender vs. Warrender (9 Bligh., 89), and will not probably survive much longer, if it have not already been overthrown, as an authority in the English Courts.

The Scotch judiciary have always held that they had jurisdiction in cases of divorce, even between strangers who were commorant in Scotland, provided the alleged cause of divorce had occurred in Scotland. They treat the cause for divorce as an offense against their laws, which they will punish by granting a divorce to the injured party. But they require, in such case, the guilty party to be amenable to their process, and the offensive cause to have been committed within their jurisdiction.

So long as the marriage contract is executory, it is on the same footing with other personal contracts, and for its violation the injured party may sue the other wherever the latter may be found; or, the contract may be cancelled by mutual agreement. Nor is the law at all solicitous about

the forms or ceremonies with which the marriage may be solemnized. Ability to contract and consent of the parties are all that is required.

But after the marriage has been solemnized the contract is thenceforth *functus officio*. The parties have then become subjects of the marriage state, an institution whose obligations and duties are independent of contract and of the will of the parties, and imposed by the law for the welfare of society; an institution established in the beginning by the Almighty Lawgiver, and recognized in every age as the foundation of civilization, prosperity, and virtue without which the human race itself must perish from its own vices; the refiner of manners, the parent of knowledge, thriftiness, and industry; the promoter of decorum, order, and decency in private life; the strength and bulwark of the state; the secure basis of society, and the ornament of all its institutions; "*principum urbis, et quasi semiranium reipublicae.*"

An institution so established in the laws and bound up with the structure of society, the State cannot allow to be made the subject of traffic like a chattel. So long, therefore, as the parties retain their domicile under its jurisdiction, the State will not permit its policy to be thwarted and its laws invaded by the interference of any foreign tribunal. As well might any legislature assume to dissolve the marriage bonds between the citizens of a different State by an immediate act, as to attempt to accomplish the same purpose by means of authority conferred upon its courts.

These doctrines, if correct, are fatal to the proceedings in the present case; but it still remains for us to examine more particularly the character of the proceedings in the Indiana courts.

As already stated they were commenced by Mrs. Cheever on the 16th day of June, 1857, by a petition to the Circuit Court of Marion County, not signed by herself, nor its allegations supported by an affidavit. And, indeed, none of the allegations made in this case on either side were made

under oath or even the signature of the parties, but have their only support for truth in the signatures of the respective counsel in the pleadings, except only the two affidavits as to residence.

The petition charges cruel and severe treatment towards her on the part of her husband, and that he had abandoned her in the month of December, 1854; it states the names and ages of the four children respectively, describes the real property, and states correctly the manner in which it was settled to her own sole and exclusive use, and its situation in this city. It also sets out that she held certain stocks in her own name which were worthless, and a small amount of personal property. It prays for a divorce, a *vinculo matrimonii*, and that she may be appointed guardian of the children, two of whom were then in her custody and two with the defendant, and for general relief.

On affidavit that defendant was a non-resident an order of publication of notice was made the same day.

On the 17th of August, 1857, an order for change of venue was made to transfer the cause to Madison County for further proceedings, but for what cause does not appear.

On the 20th of August defendant appeared, and by his attorneys, filed a general answer denying each and all of the allegations in the petition, also a cross-petition, admitting that he had abandoned his wife in 1854 because of a "disagreement" between them, which was wholly irreconcilable, and that it was impossible for him to live with her, and that he was compelled to abandon her. He also prayed a divorce, a *vinculo*; for the custody of all the children, and for an assignment of the stocks, and of the rents, issues, and profits of the property in this city to him as the natural guardian of the children for their support, education, and maintenance, and for general relief.

On the same day petitioner, by her counsel, filed her answer to the cross-petition denying all its allegations so far as they were inconsistent with her petition.

It appears that some depositions had been taken on both sides, but on the 24th of August, just two days before the cause was submitted for the decision of the Court, an order was made that both parties might withdraw their depositions, and no depositions are now to be found in the record.

On the 26th the case was submitted on the petition, cross-petition, and the general answers of the parties, of the character already described. Beyond these there was not a particle of evidence before the Court, and these were the mere allegations of the counsel of the respective parties made in the pleadings. The cause was submitted without argument on either side.

The Court declared that none of the allegations of the petition were found to be true, except the charge of abandonment; and as that had been admitted by the cross petition, the Court appears to have considered it fully proved. On this foundation the divorce was decreed, as prayed for by both parties.

It was, therefore, a divorce of the parties by their own agreement, in which the Court was used as an instrument merely to put the agreement into form. The remaining portion of the decree professes to have been made by consent of parties, and assumes to dispose of the children and the property.

Two of the children, John T. H., and Caroline P., are given to the father; and Victoria Josephine is, for the present, and till the further order of the Court, given to the mother.

The other child, little Benjamin, seems to have been forgotten, as no provision is made for his case.

Some worthless stocks, which stood in the name of Mrs. Cheever, are given to the husband.

The real estate in Washington, which was held in trust for the sole and separate use of Mrs. Cheever for her life under the will of her father and by the marriage settlement with remainder in fee to the children, is disposed of



as follows: Two-thirds to Mrs. Cheever, the remaining third of the rents and profits to Cheever, for the support, maintenance, and education of such of the children as should be in his custody till they should arrive at the age of twenty-one years, and then to be divided amongst them equally during the mother's life.

At the mother's death the whole of the property to be vested in three of the children, Benjamin being again excluded.

And it was ordered that Mrs. Cheever should execute a power of attorney to authorize Mr. Cheever to receive and collect his third of rents and profits so given to him by the decree, as the same should thereafter become due and payable. In professed obedience to this decree, Mrs. Cheever did execute a power of attorney for that purpose, but stated in the body of the instrument that it was subject to an incumbrance of about five thousand dollars upon the whole rents, which had already been advanced to her by her tenant, Wilson, to be deducted out of future rents.

This power of attorney of assignment, was looked upon by Cheever as an attempted fraud upon his rights under the decree and in this suit he repudiates it altogether, and claims to have the Indiana decree enforced according to its terms, charges fraud and collusion upon Wilson the tenant, with Mrs. Cheever, to deprive him of his rights, &c., &c.

There are many other incidental or subordinate points in the case, which it were too tedious to consider, because their consideration is not necessary. The case has been before the auditor, much evidence has been taken on both sides, and the auditor has furnished us a long and carefully prepared report containing much evidence, long accounts and his own views upon the law and the facts, and calculations in different ways prepared to our hand, to meet our decision as it might turn out to be, according to the one or the other theory considered by him. Able and numerous counsel have been employed on both sides, and both sides

have presented many exceptions to the auditor's report, which have been fully argued before us. All parties, all the counsel and the auditor, have treated the Indiana decree as binding on the parties; and the reason, doubtless, was that it was a decree which both parties desired, and which was obtained, as we have seen, solely upon their concurrent petitions.

It is due to the auditor, however, to say that the order of reference did not specifically require him to report upon this subject.

But in our view, that decree is wholly void, as to each of the subjects of which it claims to dispose—the divorce, the children, and the property, over none of which had that court any right to assume jurisdiction.

It cannot, therefore, be respected as the foundation of a suit in this Court.

After what has been said, it may not be necessary, but for the purpose of making ourselves perfectly understood, I will restate our views of the law, distinctly and briefly.

The Constitution of the United States provides that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." That is undoubtedly the supreme law in this District as well as in the several States. But in every case, the first inquiry is as to the jurisdiction of the Court in which the proceedings were had. The Constitution does not mean that we shall give full faith and credit to the proceedings of a State Court in adjudicating a case as to which it had no jurisdiction. In such a case as that its decree or judgment is a nullity—not voidable only, but absolutely void; and the officer of the law who attempts to execute process under it may be resisted as a trespasser, and this, too, in the very State where the judgment or decree was made. *Elliott vs. Piersol*, 1 Peters, 340; *D'Arcy vs. Ketchum*, 11 How., 165.

It will hardly be pretended that decisions made by

courts not having jurisdiction over the subject and the parties, may be treated as null and void in the States where they are made, and yet be entitled to "full faith and credit" in the other States.

But we may be told that both parties to the decree made in Indiana have given their consent to and are still willing to acknowledge it as binding upon them. But this consideration strengthens our objections to that decree. The record shows it was based upon a solitary fact, which both parties, by their attorneys, came into Court and admitted; that nothing else was proved or admitted in the cause; that both parties also joined in the same prayer for divorce; that they agreed also as to the disposition of the children and division of the property; and the Court merely put their agreement into the shape of a decree. There was manifestly too much agreement between the parties to this proceeding—enough to stamp it with collusion, if it were not void already for want of jurisdiction in the Court.

Consent of parties will not give jurisdiction (see *Mills vs. Brown*, 16 Peters, 527), nor, in our judgment, will it make valid a void decree rendered in Indiana in fraud of our laws, divorcing parties whose legal domicile was at the time in this District.

No consent of parties or urgency of appeal could induce us to carry into effect a decree of that character; but, on the contrary, we feel bound to stamp it with our strongest reprobation lest we, too, should become party to the fraud, and an evil example be set by a tribunal in whose eyes fraud should be an abomination.

The consequences which may follow from this decision may be inconvenient to the parties, and, if Worcester were still living, might be serious to one of them, but they will probably prove to be less inconvenient than may at first thought be apprehended.

If these parties cannot or will not agree to condone the errors or wrongs committed in the past, and resume their

long interrupted marital relations, there are courts still open, whose jurisdiction is unquestionable, where their complaints may be filed and justice done between them after full hearing and investigation.

In any event, however, it is our duty to declare the law as we believe it to be, and so far as we are permitted to do, by the law and the evidence, to make such decision as shall tend to uphold and protect that sacred institution which was established in the beginning by the Creator, and which, if suffered to sink into neglect, or its duties and obligations to be cast aside at pleasure or for trivial causes, virtue and purity and order must cease to exist, and violence, licentiousness, and corruption pervade society.

## IN RE GEORGE F. HOTCHKISS.

A larceny having been committed beyond the limits of the District of Columbia, the stolen property was recovered by a private detective and brought into the District, whence four-fifths of it was sent to the owner, the remaining fifth was retained by the detective as compensation for his services; whereupon the superintendent of police, claiming to act under the authority of the act of Congress of July 23, 1866, demanded the delivery to him of the property so retained, and upon his refusal so to do imprisoned the detective for disobeying said order. *Held*, Upon *habeas corpus* (1) That the act of Congress was not applicable to such a case. (2) That the property having been both stolen and recovered beyond the District limits, the superintendent of police could take no cognizance of the matter, and even if he could his power to imprison for contempt a person not a member of the police force was limited (if such power existed at all) to a period not exceeding two days.

Criminal Docket. Decided August 15, 1886.

HEARING ON *habeas corpus* before a single justice.

THE FACTS appear in the opinion.

MESSRS. NORRIS and FENDALL, for petitioner.

Mr. JOSEPH H. BRADLEY, Jr., for respondent.

Mr. JUSTICE FISHER delivered the opinion of the Court.

The motion to discharge the relator has been argued by his counsel on four grounds: 1st. That there is no power in Major Richards, the Superintendent of the Metropolitan Police, to commit the prisoner for contempt, because, admitting him to be an officer or justice of the peace, still the power of a justice to commit for contempt did not exist at common law, nor has it been vested in the magistrate by any enactment of Congress, or of the Legislature of Maryland. 2d. Supposing Major Richards to possess the power of committing for contempt one of his own officers, yet the relator in this case, not being an officer amenable to his order, was not bound to obey his order to produce money,

which he had taken beyond the limits of the District from parties charged with the larceny thereof beyond such limits. 3d. That even admitting he had the power to commit for contempt one who was not a member of his police force, in disobeying his order, still the commitment is defective upon its face in being unlimited as to the time during which the relator was to remain in prison. 4th. That it is defective, also, in that it does not show in what the alleged contempt consisted.

On the part of the respondent it was argued: 1st. That the power of a justice to imprison for contempt existed at common law, which was in force in this District. 2d. That though the relator is not a member of the Metropolitan Police Force, directly responsible to the Superintendent for neglect or refusal to discharge his duty or to obey the mandates of the Superintendent, yet by virtue of the seventh section of the Act of Congress of the 23d July, 1866, every person pursuing the business of a detective, whether by regular appointment or without it, upon making an arrest of a party alleged to be guilty of a crime, is immediately to bring the alleged offender, with whatever property he may have taken into his possession from the accused, to the office of the Superintendent of Police, to be deposited with the property clerk; that it is admitted that the relator had arrested the alleged offenders and received the stolen property from them, and had sent eighty per cent. thereof to the parties claiming to have lost it, retained twenty per cent. for his services in recovering it; that he was ordered by the Superintendent to deliver to him the said twenty per cent.—about \$500—and failing to do so, the Superintendent committed him to jail for contempt in disobeying that order. 3d. That it is not necessary that the commitment should disclose the facts which constitute the contempt. It is sufficient that it show that the Superintendent convicted him by his own adjudication of the contempt, without disclosure.

4th. That the want of limitation of the time of imprisonment was not material for that, inasmuch as this was a case of committing for contempt, not as a punishment for an act done and ended, but to enforce the performance of a duty which the law enjoined upon the relator, it was lawful to imprison him indefinitely, or until he should purge himself of the contempt of which he was guilty by a compliance with the order, in which event he would be discharged by due course of law. 5th. That in a case of *habeas corpus* the judge cannot look behind the commitment of a court having competent jurisdiction.

It is true, as a general rule, that a commitment for contempt cannot properly be examined into by any other court or judge than the one who awarded it, especially when its propriety is sought to be questioned upon a writ of *habeas corpus*, since the question as to the validity of the judgment of the committing court arises in a collateral way, and not by way of review. Nevertheless, it is a great prerogative writ, the object of which is to guard against oppression, and it is the duty of the Court or judge before which the hearing on the *habeas corpus* is had to inform himself at the outset whether the committing court, is a court having competent jurisdiction to render a judgment of contempt, and if of competent jurisdiction for that purpose, to show whether the jurisdiction has been exceeded; for if the facts in the case be plainly such as make it one over which the committing court could not exercise a lawful jurisdiction, the judgment of contempt must necessarily be unlawful. Whether the alleged offender has really committed the act charged, as contempt is also a question which will be conclusively determined by the judgment of the Court, before whom it is alleged to have been committed; and so if the act be an equivocal one, harmless or criminal according to its surroundings, its innocence or culpability is to be determined by the Court committing the alleged offender. It is not

contended that the Superintendent of Police has any larger powers in a case of this sort than are conferred by law upon a justice of the peace. The jurisdiction is a special one, and in a case of *habeas corpus*, as well as in appeal or *certiorari*, it is the duty of the judge having the case to inquire, first of all, whether the justice has acted within the limits of his jurisdiction.

If, in this case, the Superintendent of Police had clear and unquestioned jurisdiction over George F. Hotchkiss, the relator, the same as though he had been a member of his police force, and if the property alleged to have been taken by said relator from the parties who are charged with having stolen it, had been stolen by them within the District of Columbia, and had within the District been taken from them on their arrest by the relator, and he has disobeyed the order of the Superintendent to deliver to him the fruits of the crime, I am of opinion it would have been competent for the Superintendent, acting in the capacity of a magistrate to have sent him to prison for the contempt of such disobedience, though he might have had no authority for so doing at common law or by any act of Congress clothing him with such express authority. For although some of the ablest judges in England have hesitated to express an opinion as to the power of a justice of the peace at common law to commit for contempt, yet, by an Act of Assembly of Maryland, passed in 1719, and still in force in this District, by virtue of the provisions of the Act of Congress, passed February 27, 1801, justices have special power conferred upon them to punish any persons who may contemn their authority without formality of law, by fine or imprisonment, or by sitting in the stocks at their discretion; provided the fine do not exceed 1,000 pounds of tobacco or the imprisonment do not exceed two days, or the "sitting in the stocks" do not exceed two hours. It is needless for me to say what the common law was in reference to the subject of the



power of a justice to commit for contempt. If that power did exist, it has been limited by the act of 1719. If it did not, it was conferred by that act to the extent therein provided.

In this case, however, it is admitted in the argument that the stolen property was taken in New York, whence the thieves made their escape into the State of Maryland, where they were apprehended by the relator, and where the stolen money and other property were taken from them by him, brought into this District and four-fifths thereof returned to New York by Adams Express Company, and the remaining fifth kept by him as compensation for his own services and those of his assistants in recovering the property. As Superintendent of Police in this District, Major Richards has no more power to take notice of a case where property is taken from an alleged thief outside its limits than any gentleman residing here in private life. The theft, if any, was not committed in his jurisdiction, nor alleged stolen property brought here by the thieves, or, if it were brought here by them, it was not discovered on them or taken from them until they were beyond the limits of his jurisdiction. The same reasoning that would give him jurisdiction of this case would confer upon him the power to bring before him any detective residing in Maine, who might, in that State, arrest the thief and take from him property stolen in New Orleans, if on his way to the latter place to return the property to its owner, he should be unfortunate enough to stop here ten minutes for refreshments. Moreover, admitting the right of the Superintendent to imprison the relator at all, the latter had already been in prison when the application was made for the writ, a longer period than is authorized by law, which limits it to two days.

I purposely abstain from attempting any construction of the seventh section of the Act of Congress of the 23d of July, 1866, because the facts involved here do not present

a case requiring it, and because, owing to the doubt and obscurity of its language, I confess myself unable, in the limited time afforded me for this investigation, to arrive at any settled opinion as to its true meaning and purport.

It is sufficient that the superintendent acted in a case where he had not competent jurisdiction, and that if he had the power to imprison for contempt at all, the life of that power expired by limitation of law two days after the prisoner was committed to the custody of the warden. It is, therefore, ordered that the said George F. Hotchkiss be discharged from his imprisonment under the commitment of the Superintendent of Police.

LOUISA HAYES  
vs.  
AUGUSTUS JOHNSON Et AL.

1. A deed of assignment by an insolvent which authorizes the trustee to make sale of the assigned property " whenever he shall think proper and conducive to the interest of the trust " is void as to creditors.
2. So such a deed is void which requires a release from the creditors as a condition of their sharing in the proceeds of the assigned estate.
3. It is also void where by its terms it provides that the trustee shall not be liable for any loss that may happen to the trust estate " unless the same be consequent upon his wilful commission, omission or neglect," the effect of such a provision being to exempt the trustee for failing to exercise ordinary care, and it would seem to exempt him even for acts of gross negligence.
4. The mere fact that one is unable to pay his debts at the time of obtaining a loan does not render the transaction fraudulent. *Aliter* if at the time of negotiating the loan he knew that he could not pay it, or did not intend to pay it.
5. If an assignment be fraudulent, execution may be had by *fiery facias* without coming into equity to have the deed set aside.

In Special Term. Equity No. 523. Decided Dec. 31, 1886.

BILL to set aside a fraudulent assignment.

MR. WM. JOHN MILLER, for complainant.

MR. JUSTICE OLIN delivered the opinion of the Court:

MR. JUSTICE OLIN delivered the opinion of the Court:

The bill states that on the 8th of May, 1865, Johnson and Boher made two promissory notes for \$250 each payable to the order of Carrie Hayes sixty days after date, and that before these notes fell due they were transferred to the complainant for a valuable consideration.

That Johnson and Boher borrowed from the complainant on the 15th February, 1865, \$1,000, and executed their note for that amount payable three months after date.

That the complainant fearing that Johnson & Boher were insolvent, caused writs of attachment to be issued against

them on these notes, and the bill contains the further averment that "*the attachments were duly laid in the hands of John Henry aforesaid.*" As nothing had been said about "John Henry aforesaid" up to this time in the bill of complaint, nor anything subsequently so far as I can discover, I was not a little puzzled to understand why these attachments in the language of the bill, "*were laid in John Henry's hands.*"

Upon inquiry I am informed that it was intended to aver, that the writs of attachment were issued against Johnson & Boher and *levied upon their goods* or credits in the hands of Henry; that Henry filed his answers to the writs of attachment admitting that he owed Johnson & Boher \$1,558.60.

The bill further alleges that in September, 1865, the complainant obtained July 1, judgment of condemnation of the goods seized under the writs of attachment, but that it was subsequently discovered that Mr. Ennis, an attorney of this Court, had before such judgment entered his appearance, and the judgments being taken *ex parte*, a motion was made to set them aside as irregular, which motion was granted.

It ought to have been before observed that Johnson & Boher are alleged in the bill of complaint to have been non-residents of this District, and that in pursuance of the former practice of this Court (now very wisely corrected by act of Congress) a non-resident whose goods were attached had only to employ some one calling himself a lawyer to enter his appearance in the cause as attorney for defendant, and such appearance *ipso facto* dissolved the attachment, and the debtor usually hurried out of the District his goods and left his creditor without recourse.

In June, 1865, Johnson & Boher, being insolvent as before observed, made an assignment for the benefit of their creditors; this assignment is made an exhibit in this com-

plainant's bill. It is void and fraudulent upon its face for several reasons.

1st. The assignment contains this provision in effect: "The trustee (assignee) is hereby authorized and empowered to make sale (of the property assigned) *'whenever he shall think proper and most conducive to the interests of the trust.'*"

To sanction a provision of this kind would allow a debtor to place his property in the hands of his friend, and say to his creditor that whenever *my friend* thinks it wise, prudent, or proper to dispose of this property in payment or part payment of your debt he may do so; until then you must wait.

A man's property is liable for the payment of his debts, and courts should not countenance any attempts by way of hinderance, delay, &c., to the immediate application of such property to the payment of honest debts. To hinder and delay creditors has been an offense for near three hundred years.

In the second place, the trust deed contains this provision in effect, that the moneys arising from the sale of the trust estate "shall in the first instance be held liable for and be applied to the payment of all expenses attending the execution of the trust inclusive of counsel fees for prosecuting claims of and defending and resisting claims against the trust estate, and also reasonable commissions to the trustee," &c.

This provision is an express authority for the trustee to expend whatever shall be realized on the sale of the trust estate for the benefit of the legal profession, if he thinks proper to do so, in counsel fees, and looks very like an invitation to do so, in preference to applying such surplus to the payment of honest debts. Such a purpose, however, worthy we might esteem it, under ordinary circumstances, does not in this case quite command approval. I think the equities of a creditor to a participation in his debtor's estate superior to that of the legal profession.

The assignment contains this further provision, after distributing the estate from first to ninthly, the trustee is directed then "to pay in such order and priority and out of such part of the trust funds as by law they may be entitled to be paid all such of the creditors of the parties of the first part in their copartnership or individual relations as shall within ninety days from the date of this deed signify their assent to the terms thereof, and execute and deliver to the said parties of the first part a full and final release and discharge of and from all claims and demands against them, or either of them, to the time of executing these presents, in full satisfaction and payment of all such claims, with all interest thereon, of such creditors assenting as aforesaid and executing such release of the funds applicable to them respectively, as shall be insufficient to discharge the whole." Then, tenthly, &c.

The legal effect of this provision, quoted at some length, is simply this: A debtor in failing circumstances says to his creditors, I have provided for nine of my friends, creditors of my estate. There may be something left after paying them, and there may not be. If there is any thing left you shall be permitted to share ratably in that surplus, provided you will execute a release in full of all I owe you, and run your chance of taking some thing, most likely nothing, after my nine friends before mentioned have been first served.

There is one other provision in this assignment which deserves notice. It is provided in conclusion "*that neither the trustee nor his representatives shall be answerable for or bound to make good any deterioration or loss that may happen to the said trust estate effects and property, unless the same be consequent upon his wilful commission, omission or neglect.*"

If legal effect were given to this provision, it would certainly exempt the trustee from all liability for failing to

exercise *ordinary care* in the management of the trust estate; and it is doubtful whether he could be held liable for acts of gross negligence. Observe, that the language of the deed is, that the trustee is only to be liable for acts of "wilful commission; omission or neglect" in the management of the trust estate. I understand this provision to mean that however negligent, dilatory, inattentive or foolish the trustee may be in this management of the trust estate, the trustee is to be held harmless, and the creditor remediless; that nothing short of a wilful commission, omission or neglect resulting in waste of the estate shall be a ground of liability against the trustee.

For more than two hundred years a trustee, from motives of public policy, has been held to the *exactest* diligence in the discharge of the duties of his trust, such as guardians, executors, administrators, &c., but here is an attempted provision for relieving a trustee from all kinds of negligence and inattention to the duties of his trust, unless the party complaining can show to the satisfaction of a court that the act of "commission, omission or neglect" which resulted in the waste or destruction of the estate *was wilful*, that is, intentional. It will be a long time, I trust, before a court of law, and especially a court of equity, will open the door to all the possible frauds which might and naturally would be practiced if the foregoing provision were held to be legal.

The assignment, therefore, upon each of the grounds I have mentioned is fraudulent and void as against the creditors of Johnson & Boher.

The bill further states with little regard to the order of events that on the 8th of May, 1865, just about one month before the execution of the assignment, Johnson (one of the defendants) applied to the complainant for a further loan of \$1,000, that she delivered to him her check for that amount on the banking house of Lewis Johnson & Co., and received in exchange two notes of the firm of Johnson &

Boher for \$500, each dated May 1st, one payable in three and the other in four months from date; that after giving said check and receiving said notes the complainant alleges that "she was informed and believes that the said firm of Johnson & Boher were in failing circumstances and that she immediately called on the said banking house and stopped the payment of her check."

The complainant offers to bring into court the two notes to have them as well as the check she drew on the said banking house cancelled and delivered up. We infer from the statement of the bill that Johnson & Boher have obtained nothing upon the complainant's check.

It is not, however, averred in the bill, that at the time Johnson obtained the check he knew the firm of Johnson & Boher were insolvent or that the check was fraudulently obtained. The simple fact that the firm was unable to pay its debts at the time it procured the loan of \$1,000 from the complainant on the 8th of May, 1865, is no ground for the interference of this Court. If, however, the firm knew at the time it was negotiating the loan it could not pay, or did not intend to pay such loan, or, in other words, that the loan was made with intent to defraud the complainant, it was void both at law and in equity.

The bill further alleges in substance that after these attachments were issued against the property of Johnson & Boher, the complainant called upon one of the firm of Johnson & Boher in Baltimore, and was informed that the reason why the complainant had not been secured the payment of her claims in the deed of assignment, was because the firm supposed that she had obtained a lien upon the effects of the firm by the service of the several writs of attachment.\* He doubtless thought that a writ of attachment against the goods and effects of a non-resident debtor meant something more than the employment of a lawyer to appear in the suit and move to dissolve the writ.



The relief prayed in the bill is first an injunction restraining the firm of Johnson & Boher, the assignee Cominsky, and John Henry, a creditor of the firm of Johnson & Boher from disposing of, or removing from this jurisdiction the effects of the firm.

To this bill of complaint a demurrer is interposed assigning various causes of demurrer.

"1st. That the said complainant hath not stated in and by her said bill such a case as doth or ought to entitle her to any such relief as is thereby sought and prayed for from or against those defendants, or either of them.

"2d. That the matters stated do (not) give the complainant any cause of complaint against these defendants; the same, being triable and determinable at law, ought not to be inquired of by this Court.

"3d. That the said bill is multifarious in this, that it unites in one and the same bill the allegations with reference to the proceedings in the attachment suits in the said bill set forth in regard to which Carlie Hayes and John Henry are alleged to be necessary and proper parties, and for which relief is prayed against them, with another and distinct claim in reference to which the complainant seeks relief, wherein she alleges she has a claim to have a certain check in said bill mentioned, set forth and alleged to be in the hands of Johnson & Boher, or the assignee cancelled, a matter in which the said Carlie Hayes and John Henry are not alleged to be in any way interested."

The first two grounds of demurrer amount to nothing beyond a general demurrer to the bill. The third is good ground of special demurrer. There is nothing in the bill either by averment or inference connecting Carlie Hayes and John Henry with the procurement of the check for \$1,000 by the defendants Johnson & Boher.

The idea in the mind of the solicitor for the complainant in this case, would seem to be that a Court of

Chancery could easily remedy the operation of the law of attachment against non-resident debtors as existing at the time this bill was filed, and that this fraudulent assignment of Johnson & Boher stood in the way of a writ of *feri facias* issued by a court of law, upon the several judgments the complainant had obtained against Johnson & Boher. This void and fraudulent assignment by Johnson & Boher did not amount to the force of a cobweb against an execution obtained against the firm.

The demurrer in this case is sustained with leave of the complainant to amend her bill of complaint on payment of costs to be taxed by the clerk of this Court.

FELIX A. SALTER

vs.

ORLANDO ALLEN.

- 
1. On an appeal from a final decree of the Special Term, all interlocutory orders passed by the Court in the progress of the cause are subject to review by the General Term, except where such orders rest in the discretion of the presiding justice and do not affect the merits of the case.
  2. Where complainant is compelled to resort to a court of equity to obtain his rights in respect of a fund in controversy or relinquish them, and it appears on an account being taken that the defendants have not acted honestly, nor in obedience to the order of the Court, the costs will be charged against their share of the fund.

In Equity, No. 752. Decided April 6, 1887.

ON APPEAL from a final decree. Bill in equity for an account.

THE FACTS are stated in the opinion.

MR. ENOCH TOTTEN, for plaintiff.

MR. JOHN E. NORRIS, for defendant.

MR. JUSTICE OLIN delivered the opinion of the Court:

The bill in this case avers that it was agreed between the complainant and the defendant, Allen, and for their joint benefit, to submit a proposition to the General Government to raise certain property, sunk in the Potomac, upon being paid 45 per cent. of the proceeds of the sale of such property when raised; that this proposition for some reason unknown to the complainant was submitted in the name of Allen, and accepted by the Government on or about the 17th May, 1866.

The bill further alleges that it was agreed between complainant and Allen that the former was to advance the funds necessary for the prosecution of the enterprise and

that the moneys arising therefrom belonging to complainant and defendant, Allen, should be drawn from the General Government by and exclusively controlled by the complainant.

That on the 19th May, 1866, the defendant, Allen, for the purpose of carrying out the original agreement, between the parties executed and delivered to the complainant and assignment of one-half of his interest in the contract with the General Government; that assignment is made an exhibit in the case.

The only material provision contained in this assignment is the following: "All money that the said Felix A. Salter advances in the undertaking is to be reimbursed to him out of the first returns from the sale of the United States property so recovered, the balance to be equally divided between the parties."

The complainant further alleges that he and the defendant, Allen, entered upon the performance of their contract with the Government and that he advanced the sum of \$291.88 and loaned his credit to the amount of \$65.27 in furtherance of the work.

That a large amount of property was raised out of the river and delivered to an officer of the Federal Government at Alexandria, Va., and by him sold on the 23d of August, 1866, for about the sum of \$6,000.

That in July, 1866, the defendant, Allen, assigned or claimed to have done so, one-half of his interest in the contract with the Government to the defendant, Martin, without the knowledge or consent of the complainant, and that he, Allen, executed a power of attorney authorizing the defendant, Martin, to apply for and receive the amount due from the Federal Government to complainant and Allen, and charges that this was done with the intent on the part of Allen and Martin to defraud the complainant.

The bill also states that there is a large stock of tools, machinery, &c., purchased to carry out the agreement with

the Government, one-half of which belongs to the complainant and from the use of which the complainant has been excluded by the defendants.

It is further stated that the defendants are transient residents of this District and irresponsible, and that if they are permitted to receive the moneys due from the General Government the complainant would sustain irreparable injury.

The bill concludes with a prayer for the appointment of a receiver and for a writ of injunction to be issued against the defendant's restraining them from applying for or receiving the said moneys in the hands of the officer (Cailly) of the General Government or from interfering therewith in any manner whatever.

The answer of Allen denies that the application to the Government was made on the joint account of himself and the complainant, or that the agreement of the 19th of May, 1866, was executed for the purpose of carrying out any original understanding or agreement between the said complainant and the defendant, Allen. These averments are of little or no importance, inasmuch as the answer admits the execution of the agreement of the 19th of May aforesaid. If it were otherwise the agreement in its recital seems to confirm most strongly to the averments of the bill. It begins by saying that Felix A. Salter, the complainant, and Captain Orlando Allen having received permission from the Government to recover the United States property sunk in the Potomac River, &c., agree as follows, &c.

The answer denies that there was any agreement or understanding that he, Allen, was not to have any moneys from the hands of the Government officers, or that such moneys were to be exclusively controlled by the complainant.

That the complainant has not made the advances claimed in his bill, viz., \$921.88, but only the sum of \$881.38.

The answer further proceeds to state that the complain-

ant did not furnish all the money necessary to carry out the enterprise with the Government, an averment quite unnecessary, inasmuch as there was no agreement in writing to that effect between the parties, but simply that complainant should be first paid out of the proceeds of the sale of recovered property the amount of whatever advances he might make; and the answer further states that the complainant did not keep the schooner Susan Ann Harwood in readiness to assist in said work and transport said property as fast as raised. The same observation may be made as to the averment in the answer, to wit, that there is no agreement that the schooner should be so kept, but simply that when so employed no charge should be made for the use of it.

The answer further avers that on the 13th of July, 1866, the complainant took away the schooner Susan and removed it to Georgetown, and thereby deprived him, Allen, of the power to complete the contract with the Government, and compelled him to look for assistance elsewhere. That he thereupon applied to the defendant, Martin, who advanced him the sum of about \$800 to enable him to complete his contract, and assigned to him one half his, defendant Allen's, interest in the contract, the complainant having abandoned the contract, as he, Allen, charges and believes.

Allen admits that some \$6,000 were realized from the sale of the property recovered, and that of this sum the plaintiff and defendant, Allen, were entitled to \$2,700, one half of which last named sum the defendant, Allen, claims to be entitled to, subject to the advances made by the defendant, Martin, and subject, also, to the advances of the complainant; that of the property raised after the 13th of July last (the date when it is charged in the answer the complainant abandoned the contract), the defendant, Allen, claims that he is entitled to three fourths of the amount coming from the Government, and Martin one-fourth.

This is, perhaps, the substance of all the answer of the

defendant, Allen. The answer of the defendant, Martin, so far as he appears to know any thing of the facts of the case, is corroborative of the answer of Allen.

An injunction was granted, as prayed for in the bill, and served upon the defendant. The cause, after being at issue, was referred to the Auditor of this Court, who, having taken the proofs of the parties, made his report to the Court, September 28th, 1866.

No exception was taken to this report. The Auditor finds in his report that nearly, if not quite all, the assets of the enterprise, amounting to \$2,700, were in the hands of one Cailly, a Quartermaster of the Army, and of that sum the complainant was entitled to \$1,500.20, the defendant, Martin, to \$884.05, and the defendant, Allen, \$315.75.

The defendants of course learning the terms and conditions of this report conceived the brilliant if not honest purpose of possessing themselves of the whole fund in the hands of the quartermaster, and to that enterprise it is quite apparent from the facts in the case this quartermaster lent his aid. Allen obtained from that quartermaster \$1,500 and with considerable haste left this District and the jurisdiction of this Court, having however first left an order on the quartermaster to pay to the defendant Martin the sum of \$1,000 and instruction to retain in the quartermaster's hands the sum of \$200, to be paid to some claim agent for his service in the matter whose name is not mentioned. That service could only consist in urging the quartermaster to pay over the fund in his hands to the defendant Allen, or in advising Allen and Martin to violate the order of this Court and devising the means by which he thought it could be done with impunity. As an ominous silence in all the papers in this case is observed as to the name, residence, or services of this claim agent, and as it further appears that the quartermaster was by the arrangement between himself and Allen allowed to retain in his hands \$200, and as this quartermaster had himself taken the pains

to obtain from the second comptroller a certificate that courts of law could not restrain by writs of injunction the various bureaus of the Federal Government, I am constrained to believe that this quartermaster is virtually and truly none other than the claim agent who reserved this sum of \$200 for his complicity with the defendants in violating the injunction of this Court. I come to this conclusion reluctantly, but the force of facts proven in the case, and the absence of explanation where explanation could be easily made if there were any, compels the belief that the quartermaster entered into this conspiracy with the defendants to violate the order of this Court and for a consideration in money.

I will here remark that while I fully concur in the rule which exempts the heads of the various bureaus of the executive departments of the government from interference or supervision by courts of law in respect to all matters which the Constitution or laws have committed to their discretion or judgment, I still think there is no rule of law or public policy which would exempt a corporal or quartermaster of the army from the service of a writ of injunction and from punishment for its violation unless he can show by way of excuse that the act done in violation of the order of the Court was done in obedience to the express directions of the executive department of the government.

The complainant thus finding that the whole fund in the quartermaster's hands had been disposed of, not in pursuance of the order of this Court, made application for writs of attachment against the defendants for a violation of the writ of injunction. Allen, having fled the District, Martin was served with process and appeared and answered as well as he might the alleged contempt. His answer is amusing for its simplicity and ridiculous by way of defense.

It is in substance that in drawing the \$1,000 from this quartermaster he did not intend to violate the order of this Court, but as he got an order from Allen on the quarter-



master for the money and the quartermaster paid him the money on that order, he supposed he was receiving the money from Allen and not from the quartermaster, and therefore was not violating the writ of injunction issued in the case.

It will be perceived that of the \$2,700 in the hands of the quartermaster, Slater was by the auditor's report, entitled to \$1,500.20, Martin to \$884.05, Allen to \$315.75. It is perfectly apparent that both Allen and Martin knew all about the character and terms of the auditor's report and the share of this fund to which each was entitled. They did not like that distribution and thereupon Allen takes \$1,500, Martin \$1,000, and \$200 is left for this mythical claim agent which uses up the entire fund.

Upon the hearing of the attachment Martin is very properly convicted of a contempt of Court for a violation of the injunction, and was ordered to pay into Court the \$1,000 he had received from the quartermaster and in default thereof be committed to the Jail of this District.

The money being paid into Court the cause came on for hearing and final decree upon the pleadings and auditor's report, and it was decreed as follows: "That the complainant Salter receive out of the sum of \$1,000, the sum of \$629.21 and pay two-thirds of the costs of the suit and that the said Martin received the sum of \$370.79, and pay one-third of the costs of this suit, and that Salter have execution against Allen for the balance reported due him."

From this decree an appeal is brought to this Court, and the sole question in the case and one, too, of much practical importance is, whether on appeal to this Court from a final decree of a justice sitting in equity every interlocutory order made by such justice in the progress of the cause may be examined into, revoked or altered in such way as in the judgment of this Court is proper and just; or whether this Court on appeal can make any and every modification of any interlocutory order which may have been made in the

progress of the cause as to this Court seems proper and meet to have been made.

We think the true rule to be this, that all interlocutory orders are open to review on appeal, except where such orders rest in the discretion of the presiding justice and do not affect the merits or justice of the case.

Tested by this rule we think the order passed on the attachment to show cause for contempt as well as the final decree are both open to examination, especially as the final decree seems to have been but a corollary from the order made on the attachment.

This, then, is the case, after the report of the auditor is made, and with full knowledge of its contents by the defendants Allen and Martin, they conspire together to overreach the injunction order of this Court, and to possess themselves of the whole fund in litigation. They execute that purpose, Allen escapes the jurisdiction of this Court, Martin is caught with \$1,000 in his pocket. He is arraigned before this Court for a contempt of its process, is convicted, and on the final decree is allowed to take the same share of this \$1,000 that he would have been entitled to recover had he acted honestly and obediently to the process of the Court. The papers in the case show, and the statement of Martin clearly prove his complicity with Allen in the attempt to violate the order of the Court and possess themselves of the fund in dispute. It will be seen by the agreement of the parties between Salter and Allen, that all advances made by Salter in the prosecution of their contract with the Government, were to be first paid out of any fund realized. The auditor finds that Salter had advanced \$841.87 in aid of the enterprise. This amount Salter was entitled to receive before the division of profits commenced. Giving Salter that sum there would be left from the fund paid into Court the sum of \$158.13, perhaps enough to pay the costs of this litigation. That sum of \$158.13 was profits, and Salter was entitled by the terms of the contract and

the decision of the auditor to one half, \$98.06. There remained the same amount to be distributed between Allen and Martin, supposing the whole fund for distribution had only amounted to \$1,000, but as Allen had got into his possession \$1,500 of the fund with the complicity of Martin, when there was due to him but \$315.75, he would seem to have no very strong equity for sharing one-quarter of the balance of the \$158.13 to be distributed on the final decree. We are at a loss to discover upon what principle it is decreed that complainant Salter is made to pay two-thirds of the costs of the suit.

He was compelled to resort to a court of equity to obtain his rights or relinquish them. He had but one-half interest in the controversy, and had Martin and Allen acted honestly and obediently to the order of this Court, the costs of the litigation might properly be charged upon the fund. But there seems abundant reason in this case for the application of a different rule.

We think the decree below should be so modified as to pay to complainant Salter out of the fund in Court the sum of \$841.89, with interest thereon from the 28th of September, 1866, and that out of the balance remaining the complainant be paid the costs of this suit if sufficient for that purpose. If any sum remain after the payment of such cost the complainant to receive one-half thereof and the defendant Martin the other half, and that the complainant and defendant Martin have execution against the defendant Allen for such sums respectively as by the auditor's report may be due them, deducting the amount recovered from the fund in Court.

ELLEN OWEN *ET AL.**vs.*

## ELLEN KELLY.\*

- 
1. By the Act of Congress of February 10, 1855, an alien woman marrying a citizen of the United States becomes a citizen by virtue of her marriage.
  2. The terms of the act apply to every woman of white blood married at the time of its passage, or who should afterwards become married to a citizen of the United States.

Equity No. 70. Decided May 7, 1867.

APPEAL from a decree in equity.

THE BILL was filed to procure a partition or sale of the real estate of Miles Kelly deceased.

THE FACTS are stated in the opinion.

MR. WM. JOHN MILLER for complainants.

MR. R. J. BRENT for defendants.

MR. JUSTICE OLIN delivered the opinion of the Court:

The history of this case is briefly as follows: Miles Kelly, a native of Ireland, emigrated to this country some twenty years ago, settled in the District of Columbia, was naturalized in 1855, acquired property real and personal, intermarried with Ellen Duffy, and died on the 2d day of March, 1862, intestate and without issue, but leaving surviving him in the United States the said Ellen his widow, and his two sisters Ellen Owen and Margaret Kahoe. His widow Ellen Kelly claimed the residue of his estate after the payment of debts to the exclusion of his sisters Mrs. Owen and Mrs. Kahoe, who it is contended are not entitled to take

---

\*Affirmed in the Supreme Court of the United States. See *Owen vs. Kelly*, 7 Wall., 496.

any portion of the same as his heir-at-law. Upon a bill filed by the complainants below who are the appellants in this Court, the chancellor decreed in favor of the widow to the exclusion of the sisters. From this decree the appeal was taken.

The act of Congress upon which both the widow and the sisters found their claim is the Act of February 10, 1855, Section 2, which declares, "that any woman who *might* lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." This provision is substantially a transcript of the 16th Section of 7 & 8 Victoria, chap. 66, except that the words "who might lawfully be naturalized under the existing laws" are interpolated in our act, and it is upon the construction of these words that this case depends.

It appears from the evidence that Mrs. Owen and Mrs. Kahoe came into this country from Ireland after they had arrived at the age of eighteen years, which made it necessary, in their cases, had they remained single under the laws existing anterior to the act of 1855, that they should declare their intention to become citizens at least two years prior to their application for admission to citizenship. It also appears that such declaration of intention never was made by either of them prior or subsequent to marriage. It also appears that at the time of the passage of the act of 1855 Mrs. Kahoe was the wife of a citizen of the United States, and that in 1861 Mrs. Owen became also the wife of a citizen of the United States. It also appears that the widow, Mrs. Kelly, was at the time of her coming into this country under the age eighteen years, so that no declaration of intention was necessary to be made in her case in order to entitle her to admission as a citizen, had she remained single and after five years residence in this country presented herself for naturalization.

The only difference in the cases of the sisters and of the widow so far as it relates to the right to take from Miles Kelly, is that the former came into the United States after they had arrived at eighteen years of age whilst the widow came here before she had arrived at that age. The decree of the Court below, therefore, decides that while the widow, Mrs. Kelly, comes within the meaning of the act of 1855 and is a woman, or was a woman, who might be lawfully naturalized under the laws existing prior to February 10, 1855, yet the sisters of the deceased, Mrs. Owen and Mrs. Kahoe, were or are women who might not be lawfully naturalized under the laws existing at that time.

We do not agree with that opinion. We think that the sister, as well as the widow of Miles Kelly, were, at the time of his decease, citizens of the United States, by virtue of their intermarriage with citizens.

The language of the act of February 10, 1855, is "any woman who might be lawfully naturalized under the existing laws." This word "lawfully" may and ought to be eliminated from this clause it being tautological and superfluous. The expression would then be "any woman who might be naturalized under the existing laws married" (at the time of the passage of the act) "or who shall be married" (after the passage of the act) "to a citizen of the United States shall be deemed and taken to be a citizen." Now, the word "might" is the preterite of the word "may," which, according to the best lexicographers simply means "to be possible," and "might" is defined by Webster as equivalent to "had power" or "was possible." The word "might" in the section in controversy has relation to the power or the ability of the woman to become a citizen under the laws existing prior to 1855. Now, let us see whether the sisters of the deceased when they were married had not the power or ability to obtain naturalization under the laws existing prior to 1855. Under those pre-existing laws any "alien

being a free white person " might (that is to say had the ability to) become a citizen of the United States by complying with the conditions prescribed by the law in that behalf. In the case of the sisters it is true that one more condition was necessary than in the case of the widow, to wit, the declaration of intention two years previous to application. But might they not have complied with that condition; that is to say, was it not possible for them to have made that declaration? The clause in controversy was intended to embrace in its provisions every woman of white blood who was then married or should afterwards become married to a citizen of the United States. It was intended to exclude no woman from citizenship whose husband was a citizen at the time of the passage of the act or should become so after its passage, except women of color.

The intention of Congress in passing the act of 1855 was to conform the law of naturalization to the common law principle of *baron and feme* which merged the existence of the wife in that of her husband and under the operation of that act nothing more is necessary to make an alien white woman a citizen than simply that she should intermarry with a citizen of the United States or be the wife of an alien who shall after her marriage become a citizen. The law of 1855 embraces the case of a white woman in Europe who marries there with a citizen of the United States or who marries an alien abroad if her husband shall come into this country and be naturalized no matter whether the woman herself has ever lived here or not. This must be so because it is possible for any white woman to become naturalized under the law existing before the passage of the act in question. If the woman be white she may come into this country, may file her declaration, may reside here five years, may prove herself to be a woman of good moral character from the time of her coming here till her application for citizenship by acting in such character, may prove herself to be attached to the Constitution of the United States by

manifesting such attachment, may prove herself well disposed to the good order and happiness of the country by evincing such disposition, and finally may renounce her allegiance to any other dominion, which are the conditions required for citizenship.

We know it is argued that Congress only intended to substitute marriage for the final judicial act of a court of record in the formal admission to citizenship in passing the act of 1855. If such had been the intention it was very easy to have so expressed it. There seems to be no good reason why such should have been the intention. Why should Congress intend to qualify Mrs. Kelley to take the whole of her husband's estate simply because she came to this country one day before she was eighteen years old, whilst it would disqualify her from taking a single farthing had she come here the day after she had attained that age.

In the absence, therefore, of language clearly expressing such legislative intention, and in the absence of the least shadow of reason why such intention should have existed we are constrained to follow the way in which the plain philology of the Act of 1855 lead us, and to construe it to embrace within its comprehensive meaning not only the case of Mrs. Kelly but also the cases of Mrs. Owen and Mrs. Cahoe and to make citizens of them all. Under this construction Mrs. Kelly would be entitled to her share of the estate as the widow of Miles Kelly deceased, and the sisters, Mrs. Owens and Mrs. Cahoe would be entitled to the residue as his only heirs-at-law in this country at the time of the descent being cast.

Decree below reversed and a decree passed in accordance with this opinion.



UNITED STATES, EX REL. GEORGE T. LANGLEY,

*vs.*

SAYLES J. BOWEN ET AL.

SAME EX REL JAMES E. TARTON.

SAME EX REL BOYD.

- 
1. The Acts of Congress of January 8, and February 5, 1867, and the joint resolution of March 30, of that year, construed and the powers and the duties of the judges of election in making the registry of qualified voters defined.
  2. Where the time is fixed by statute for the hearing of applications to the board of judges of elections to add to or omit from the list of voters the names of particular persons, a petition to this Court for a writ of mandamus to compel the board to register the petitioner's name will be dismissed as premature when the board has not yet held its sessions for hearing such applications.

At Law. Decided May 11, 1867.

Application for writs of mandamus against the judges of registration to compel them to reopen the registration books and to allow the petitioners to register therein as legal voters of the District.

THE FACTS are sufficiently stated in the opinion of Mr. Justice Olin.

MESSRS. JOSEPH H. BRADLEY, R. T. MERRICK and W. Y. FENDALL for petitioners.

MESSRS. WM. A. COOK and A. G. RIDDLE for respondents.

MR. JUSTICE OLIN said :

This is an application on the part of George T. Langley for a writ of mandamus to be issued against Bowen and others, judges of election appointed by this Court, in pursuance of an Act of Congress, approved February 5, 1867, commanding said judges to place upon the registry of voters

the name of the petitioner as a qualified voter of this District.

Upon the presentation of the petition to this Court a rule was granted for the respondents to show cause, upon a day named, why this writ should not issue. The respondents appeared in pursuance of the rule and, interposed their answer to the petition.

The material facts stated in the petition, which is verified by the oath of the petitioner, are as follows: That he has resided in the District of Columbia for the period of more than one year from the 30th day of April last; that he had been for a period of more than three months before that date a resident of the Third Ward, in the City of Washington, in said District, and proposed at said date and does still propose to continue to reside in said ward in said city; that he is a male person, not a pauper, and not under guardianship; that he has not been convicted of any crime or of any infamous offense, and has not voluntarily given aid and comfort to the rebels in the late rebellion; that he is a qualified voter, entitled to vote at the elections in said city, under the laws of the United States; that for twenty-five years past preceding the date of this petition he has been a tax payer and a qualified voter under said laws of the United States, and from time to time he openly voted at the election in said City of Washington.

And the petitioner further states that on the said 30th day of April last, and whilst the said judges of election were sitting for the purpose of discharging the duties devolved upon them by the act of Congress heretofore mentioned, preparing a list of the persons qualified to vote in said city at said election, he (the said petitioner), presented himself in person to said judges and demanded that his name should be placed on the registry or list of persons qualified to vote in the Third Ward of the City of Washington, claiming to possess the qualifications of a legal voter, as particularly set forth in the notice made a part of

his petition, and marked "Exhibit A." This exhibit represents the petitioner to be a native citizen of the United States; to have resided in the District of Columbia for more than the period of one year preceding this date, and a resident of the Third Ward of the City of Washington for three months preceding said date; is neither a pauper nor a person under guardianship; is upwards of twenty-one years of age; and has not been convicted of any infamous crime or offense; and that he has not voluntarily given aid and comfort to the rebels in the late rebellion; and that he is a qualified voter under the laws of the United States; and that being informed that his name had been omitted by the board of registration in making up the registry for the Third Ward he demanded to have said omission corrected, and his name entered on the registry according to law.

The petitioner further states that the said judges of election then and there refused to enter his name upon the said registry of persons qualified to vote in the city of Washington, and that they still refuse so to enter the same.

The petition concludes by asking this Court to grant a writ of *mandamus* commanding the said judges of election to enter the name of the petitioner upon the list of qualified voters of the third ward of this city.

The respondent, in answer to the rule to show cause state, among other things, that they gave public notice of the times and places in which they would hold sessions to register the names of all persons qualified to vote in said city, which notice was published in the various newspapers of the city, and in reference to the third ward of the city is as follows:

"Notice is hereby given to all qualified voters in the third ward, that the judges of elections appointed to register voters under the act of Congress approved February 5th, 1867, entitled "An Act to punish illegal voting in the District of Columbia, and for other purposes," will be in session

at the council chamber, City hall, on Monday, Tuesday, Wednesday, and Thursday, April 1st, 2d, 3d, and 4th, from three to seven o'clock in the afternoon, for the purpose of receiving and recording their names."

They further aver, that while they remained in session for the said third ward, in which the said relator, George T. Langley, claims to reside, he did not appear at any time or place, nor ask in any manner to be enrolled as a voter of said ward; nor have they any information or knowledge that he was such a voter, or that he claimed or desired to be so regarded, and that it was not until after the sessions for the said Third Ward were closed, and they were engaged in the preparation of a list of persons qualified to vote in the Seventh Ward, that he appeared and claimed to be a voter in the Third Ward, and served on them a notice, a copy of which accompanies the petition, and is marked "Exhibit A."

They further aver that said Langley did appear in the Seventh Ward, and that an oath was administered to him by Peter F. Bacon, one of the said judges, and that Langley then stated that he knew of the time and place of the registration of voters in said Third Ward, and that he voluntarily remained therefrom; and that at the time of his said appearance the said defendants informed him that they had made up the list of voters of the Third Ward, and were engaged in preparing that of the Seventh Ward, and had not the books of the Third Ward present, and that they would not then enter his name; that they did not then, nor have they since entered his name on the list of voters in the said Third Ward, but for reasons herein set forth and others, they declined and still decline to do so.

They further answer, that at the present time they have no knowledge or information as judges, or otherwise, to satisfy them that he, Langley, is a qualified voter of said ward and city under the provisions of the act of Congress in such case made and provided; nor can they admit that

he has not voluntarily given aid and comfort to the rebels, or that he has not been convicted of crime, or any of the other allegations of his petition as regards his claim or right to vote in said city.

They further aver that they have prepared lists of persons qualified to vote in the several wards of the said city of Washington, including the said Third Ward; and that a copy of the lists so prepared for said Third Ward was posted up in public places according to the act of Congress of February 5th, 1867.

These are believed to be all the material facts in the case of Langley against the judges of election. The question raised by the petition and answer of the defendants is, namely, "What is the proper construction of the act of Congress creating these judges of election and commanding them to make a registry of the legal voters of the District?"

Some intimations were made in the argument of this case that the judges of election, having published a notice in newspapers of this city that they would sit on certain days mentioned in such notice to make a registration of the voters of a particular ward in the city, and that after having held such session and the petitioner having notice of such session, and without any valid excuse for not appearing before such board absented himself, that he is not entitled to be registered as one of the legal voters of this city although he afterwards came before said board when sitting to make a registry of the voters of another ward of the city and applied to be registered as a voter of said city.

An oath was tendered him, as I infer from the papers not as to his qualifications as a voter, but as to whether he had voluntarily abstained from appearing before the board, when public notice was given and brought home to his own personal knowledge, that the board of registration was sitting in his own ward to listen to applications of citizens who might claim to be entitled to be registered as legal voters;

that on admitting under the oath so administered that he was aware of the session of the board for the purpose of making a registry of the ward wherein he resided, the board refused to further consider his application, and declined to place his name upon the list of voters. Application is made to this Court for a writ of mandamus to compel the board to place him upon the registry of voters.

These facts raise the question of the true meaning and construction of the Act of Congress, relating to the qualification of voters in this District, and the powers and duties of the judges of election appointed by this Court in pursuance of the Act of February 5, 1867.

By an Act of Congress passed January 8, 1867, it was provided "That each and every male person, except paupers and persons under guardianship, of the age of twenty-one years and upwards, who has not been convicted of any infamous crime or offense, and excepting persons who may have voluntarily given aid and comfort to the rebels in the late rebellion, and who has resided in the said District for the period of one year and three months in the ward or election precinct in which he shall offer to vote next preceding any election therein shall be entitled to the elective franchise, and shall be deemed an elector, and entitled to vote in any election in said District, without any distinction of color or race."

By an act of Congress, approved February 5th, 1867, it was among other things enacted, "That there shall be five judges of election within and for the city of Washington, \* \* \* "who shall hold their offices for two years, and until their successors shall be appointed and qualified, and whose duty it shall be, prior to each election, to prepare a list of persons qualified to vote in the several wards of said cities at any election; and said judges shall be in open session in the city of Washington, to receive evidence of the qualifications of persons claiming the right to vote at any election therein, and for correcting said lists on two days not

exceeding five days prior to each election for the choice of city officers, giving prior notice of the time and place of each session in some newspaper."

Under the joint resolution of Congress, passed March 30, 1867, among other things it was provided, "That it should be lawful for any of the judges of election to administer oaths in all cases relating to the duties assigned them by law, and any person wilfully guilty of perjury, should on conviction thereof, be subject to imprisonment for a term of not less than one or more than five years."

I have now quoted the substance of all the various acts of Congress in relation to this subject. It would seem to be a question of little doubt or embarrassment as to what were the duties of these judges of election, or rather judges of the qualification of voters in this District. It will be seen by the language of the third section of the act of February 5, 1867, that the Supreme Court of this District was empowered to appoint five judges of election for the city of Washington, who, it is declared, "shall hold their office for two years, and until their successors shall be appointed and qualified, and whose duty it shall be, prior to each election, to prepare a list of the persons qualified to vote in the several wards in said cities at any election, and that said judges shall be in open session in the city of Washington to receive evidence of the qualifications of persons claiming the right to vote at any election therein, and for correcting said lists on two days, not exceeding five days prior to each election for the choice of city officers giving prior notice of the time and place of each session in some newspaper."

By section fourth of the same act it is provided that prior to said election the judges in the respective cities shall put up a list of voters thus prepared in one or more public place in said cities at least ten days prior thereto.

The plain meaning of these provisions is that a duty was imposed upon the judges of elections of the City of Washington, to prepare a list of all persons who they believed to be

qualified voters under the acts of Congress before recited acting from honest motives, with reasonable diligence, and to put that list, thus prepared, in one or more public places in the city, at least ten days prior to the election. That these judges were to hold a session on two days not exceeding five days prior to the election, giving notice of the time and place of each session in some newspaper, at which session they were to receive evidence of the qualification of persons claiming the right to vote in any election therein, and for the purpose of correcting said lists so made of the voters of the city.

The mode adopted by these judges of elections to ascertain who were voters of the District under the provisions of the act of Congress, before quoted, was probably a very proper, prudent, and expressive mode of ascertaining who were the qualified voters of the District, and yet the act is entirely silent as to the means the judges of the election shall employ to ascertain who are the qualified voters of the District.

The question is reduced simply to this: A plain duty is imposed upon these judges to make a list of all persons they believe to be qualified voters in the District. It was their duty to record the name of every man they believed to be a qualified voter, whether such person made personal application to the board or not. They were to discharge this duty faithfully, honestly, diligently, to ascertain by the best means in their power who were the qualified voters of the District.

It was not their duty simply to inquire who desired to be registered as a voter of such District. It was their duty to place upon the list each and every person they honestly believed to be a qualified voter, whether such person made or omitted to make application to be registered as a voter of the District. After having performed this duty they were to put up a list of all the voters in said city in one or more public places and then, subsequently, to hold at least two days



session for the purpose of hearing application of voters to be placed on the list thus made, or for the purpose of hearing applications to reject from the list so made by them persons who were not qualified to vote, and until this final discharge of their duty the list of voters cannot be said to be complete.

The object of the statute in authorizing this board to assemble and correct the list, and hear evidence, was not only to strike from the list those persons who had been put on mistakenly, but to add to that list persons who were omitted.

It appears from the petition and return in the case of Langley, rather argumentatively than otherwise, that the board refused to place his name upon the registry because he had notice that the board was in session in the Third Ward, of which he was a resident, and omitted voluntarily to go before them; that for that cause he was not entitled to be registered as a legal voter of the District. I think the board erred in that respect. The law commanded them to make a registry of the legal voters of the District. The performance of their duty did not at all depend upon the fact whether a legal voter asked to be registered or not. If the board had reason to believe, and supposed him to be a legal voter, it was their duty to place his name on the registry, whether he did or did not make application to be registered.

In this case, although the board refused, for the cause mentioned, to place Langley's name upon the registry of voters at the time of his application, it is not, in my opinion, to be presumed that the board will ultimately, on the two days provided by statute for listening to each application, if he should find his name omitted from the list, refuse to examine into his qualifications as a legal voter and to place his name on the registry, if they find him qualified. For that reason, I think the rule to show cause why a writ of mandamus shall not issue in his case must be denied.

There are one or two other cases involving questions

somewhat distinct from the application of Langley that may be properly considered in this connection.

In the case of Boyd, who it would seem, made an application to be registered while the judges of election were sitting for that purpose in the ward in which he resided, and claimed to be entitled to vote, objection was raised to his being enrolled on the ground of his having been convicted of an infamous offense, and therefore not entitled to vote under the act of Congress referred to.

It is sworn to in Boyd's petition that he was convicted of aiding certain slaves to escape from this District, which, by the then existing law, was made a penal offense, punishable by imprisonment in the penitentiary, and that in pursuance of such conviction he was sentenced in two cases for the respective terms of seven years each; it further appears that he presented to the judges of election, as at the time of his application, a full pardon granted by the President of the United States for the offense of which he was convicted.

With these facts before us the question to be considered in his case is whether the pardon granted by the President restores Boyd to all his rights as a citizen of the District. It would seem, from the decision in the case of *ex parte* Garland, recently made in the Supreme Court of the United States that upon this question there is scarcely room for argument.

The judges of election have taken the precise letter of the statute, which says: That no person convicted of any infamous crime or offense shall be permitted to vote. They have regarded this conviction which consigned Boyd to prison for seven years, and declared by the act felony to be an infamous offense.

Whether this offense comes within the meaning of the term "infamous offense," as known to the common law, it is unnecessary here to inquire, for I think where a full and free pardon was granted to Boyd that he stood in precisely the same relations of citizenship as though no such offense

had been committed and no conviction had been had. The meaning of the statute, in my judgment is that no person, who has been convicted of an infamous offense from the pains and penalties of which offense he has not been relieved by a full pardon, is entitled to vote, and that his name, if application be made, should not be placed upon the registry.

The case of Turton is substantially like that of Langley, with this exception, that it is alleged that the judges of election, or one of them, tendored to him an oath, which he refused to take, and that in consequence of such refusal they declined to register his name as a voter. It is not set out in the return, as it ought to be, what oath was administered, or was proposed to be administered to him, which he declined to take. Under the provisions of the joint resolutions before referred to, it is provided that it shall be lawful for the said judges of election to administer oaths in all cases relating to the duties assigned them by law. Now, the duties assigned them by law were, first, to make a registry of the legal voters of the District, which they were to do with diligence, faithfulness and care, exercising their best judgment as to who were and who were not qualified voters.

On such list being completed, it was to be published and posted in one or more public places. They were then to sit for at least two days for the purpose of correcting and examining that list. They might unquestionably administer an oath to any applicant whose name had been omitted from the list, and who claimed to be placed thereon, or to any person whose name had been put upon the list, and ascertaining from him, under oath, whether he was possessed of the requisite qualifications. They might, in my judgment, go further. They might hear proofs in contradiction of the affidavit of the application to be put upon the list, or to be removed, or whom it was proposed to erase from the list; and, if on such occasion the applicant refused to

answer all the questions which necessarily involved his qualifications as a voter, the board might very properly reject that application. If he in his affidavit swore that he possessed all the qualifications required by the act of Congress to constitute him a legal voter, the board might have contradictory testimony on that subject; and if there should be in such case evidence both for and against the party as to his qualifications as a voter, the judges of election are the only tribunal appointed by law to decide that question.

It was argued at much length, that the board was invested with judicial or *quasi* judicial powers, in making up this registry; that in some way they were to exercise their discretion upon the subject and their decision was final and conclusive. The use of the word "discretion" has no application whatever in my judgment. They were assigned a plain duty; they were to perform that duty according to their best judgment. The question of a person's qualification as a voter of this District, where evidence pro and con is submitted to the board, must be determined by the board according to their best judgment. There is no discretion whatever to be exercised. If they believe from the facts presented that the applicant is possessed of the requisite qualifications, they are so to decide and place his name upon the registry; if, from the evidence adduced before them they come to a different conclusion, they are to reject him. It is their duty to do so; there is no discretion about it. So far as they do act in judging from evidence adduced before them as to the qualifications mentioned in the act of Congress which constitute a voter in this District, they are independent of our control. They are not, however, permitted to refuse to register a voter on any such capricious ground as that he has not applied to the board for registration at any time within five days preceding the day of election.

I conclude, therefore, that the rules in these cases to show

cause why a mandamus should not issue against the judges of election should be discharged.

MR. JUSTICE WYLIE said :

The act of Congress passed on the 8th of January, 1867, declares that from and after the passage of this act each and every male person, excepting paupers and persons under guardianship, of the age of twenty-one years and upwards, who have not been convicted of any infamous crime or offense, and excepting persons who may have voluntarily given aid and comfort to the rebels in the late rebellion, and who shall have been born or naturalized in the United States, and who shall have resided in the said District for the period of one year and three months in the ward of election precinct in which he shall offer to vote next preceding any election therein, shall be entitled to the elective franchise, and shall be deemed an elector and entitled to vote at any election in said District without any distinction of color or race.

The act of February 5, 1867, section three, provides "that there shall be five judges of election within and for the City of Washington, and three within and for the City of Georgetown, the same to be appointed by the Supreme Court of the District of Columbia, who shall hold their offices for two years and until their successors shall be appointed and qualified, and whose duty it shall be, prior to each election, to prepare a list of the persons qualified to vote in the several wards of said cities in any election; and said judges shall be in open session in their respective cities to receive evidence of the qualification of persons claiming the right to vote in any election therein, and for correcting said lists, on two days not exceeding five days prior to each election for the choice of city officers, giving prior notice of the time and place of each session in some newspaper."

Section 4, "that prior to said election the said judges in the respective cities shall post up a list of voters thus pre-

pared in one or more public places in said cities, and at least ten days prior thereto."

Another and more recent act declares that no person shall be admitted to vote at an election whose name has not been placed on the list of voters, as provided for in the above act.

These respondents were appointed by this Court judges of election in pursuance of this latter statute. They proceeded without delay to make out the lists of qualified voters in each ward of this city, commencing with the First ward, and taking up afterwards the other wards in their numerical order. Public notice was given inviting all persons qualified as voters to come forward and have their names entered upon the lists, and abundant opportunity was given for that purpose.

The relator in this case was a qualified voter of the Third ward, but he neglected to claim to have his name placed upon the list; and it was, therefore, not so entered at the time when the judges were engaged in making out the list of the voters in that ward.

After the list for this ward had been completed and published, and posted in hand bills as required by law, and after all the intermediate wards had been disposed of in the same manner, till the whole work was completed except that that of the Seventh and last ward, the relator then presented himself to the judges and demanded to have the list of the Third ward opened and his name registered. This request was refused by the judges, and the relator thereupon applied to this Court for a mandamus to compel the judges to comply with his demand. The Court granted a rule on the defendants to show cause why that mandamus should not be issued as prayed, and they have presented their answer, which states in substance the facts above set forth, and also a great many other circumstances, which I make no account of, as being wholly unessential.

The law prescribes no time within which the several lists are to be completed, except only that they shall all have been made out and published at least ten days prior to the election. The list of the Third ward might have been kept open up to the last day, and then published along with those of the other wards; but this was a matter which the law left to the discretion of the judges; and they closed the list and had it published on or about the 30th of April, more than a month before the day of the next election. They pursued the same course as to each of the other wards as the lists were severally completed in their order.

It is not pretended by the relator that abundant opportunity was not offered him to have his name entered upon the list of voters of his ward prior to the completion and publication of that list; but his complaint is that the respondents refused to open the list after its completion and publication, and at a time when they were engaged in making out the list of voters in the Seventh ward. If a *mandamus* were to be issued in this case it would be impossible for the judges to close or publish any list till the very last moment allowed by law for that purpose, for there might be other applications of the same character made every day, and in each one of the wards, so that in this way every list would have to be kept open, or closed and again opened every time any one should require his name to be registered. But the law allows the judges to close the list at any time they may deem it complete, except that this must be done at least ten days before the election.

For the purpose of affording an opportunity for correcting errors in the prepared lists, the law requires judges to hold an open session of two days, not more than five days prior to each election, of which notice is to be given by public advertisement. The ensuing election will not be held till the third day of June next, therefore the time prescribed by the law for correcting the errors of the lists has

not yet arrived. We are not permitted to presume bad faith or abuse of their powers on the part of the judges; certainly no *mandamus* can be allowed in anticipation of such conduct on their part. Judicially we have no knowledge that any persons qualified as voters have been omitted from the list except the present relator and three others who have made similar applications. The two days will be ample opportunity to those persons to apply and have their names registered if they be duly qualified voters. It is said, however, that there is a very large number of other persons in the same situation, whose cases have not been presented to the Court, and that the two days may not prove sufficient for the correction of the lists. If that should turn out to be the case, it will be a misfortune to those who desire to have their names on the lists, and it may be unfortunate for the public interests. But that is an evil which may never happen, and if it should the fault of the law or the neglect of the sufferers in refusing to avail themselves of their opportunity cannot be cured by *mandamus* at this time.

It is further represented that these judges may refuse the register to names of persons qualified to vote who had wilfully or purposely neglected to have their names registered when the first opportunity was afforded them in several wards.

We cannot now act upon any such anticipated refusal of the judges to perform their duty. The fair and reasonable construction of this provision of the law cannot be mistaken by any unbiased or well disposed mind. If the party applying at that time be otherwise qualified, the judges will have no right to say he shall not have his name registered because of his previous refusal. His having declared formerly that he would not have his name placed upon the list is not a forfeiture of his franchise by any voter. The qualifications of the voters are prescribed by the law, and the disqualifications are also plainly declared; and the judges



have no right at their pleasure, or for any reason whatever, however satisfactory it may seem to them to add to or detract one jot or tittle from the law.

Should any qualified voter be refused the right to have his name placed upon the list of voters on either of the two days on any such grounds as this, it will then be time enough for him to apply for a mandamus. Or, if he should not choose to seek redress in that way, or the time be too short to furnish the opportunity, or the Court not be in session, he may have another remedy in an action for damages. In *Ashby vs. White*, 2 Ld, Raymond R., 958, Chief Justice Holt said: "Let all people come in and vote fairly. It is to support one or the other party to deny any man's vote. By my consent, if such an action comes to be tried before me, I will direct the jury to make him pay well for it."

In making this quotation, I beg to disavow any intention to adopt the threat which it contains as applicable to those respondents, but I have used it for the purpose of intimating to them the serious responsibilities they are under in the performance of the duties of their office.

I entertain not a particle of doubt that they have heretofore aimed honestly to discharge all the obligations imposed upon them by the law, and that they will continue to do so to the end, and upon the two days appointed by law for the correction of the lists of voters in the several wards every duly qualified voter who shall apply to have his name registered shall have his request complied with and that they will not undertake to inquire what he may have formerly said about his intentions in that respect. It is not their concern what he may have said, but only to inquire whether he possesses the qualifications by the act of Congress.

These principles are, with immaterial variations, applicable to all the other applications for mandamus now before us, none of which can be granted.

MR. JUSTICE FISHER said :

I concur in all the views expressed by Mr. Justice Olin, except with regard to the character of the crime of which Dr. Boyd had been convicted, and the effect of the pardon. I do not look upon any offense as infamous that is not *malum in se*—a crime regarded as infamous by the enlightened reason of humanity.

Had Dr. Boyd been convicted of such a crime, I do not believe that the pardon of the President would have the effect to render him a legal voter in this District. I am aware that a pardon has the effect to relieve a party who has been convicted by judgment of Court in a criminal case of the penalty that should be imposed by the law governing the case, but this act is not a criminal statute. The right to say whether anybody or nobody shall vote in this District is solely vested in the National Legislature.

I think, therefore, that the name of Dr. Boyd should be placed upon the registry of voters of the District.

PATRICK CAHILL  
vs.  
ROBERT L. HARRIS.

---

1. Trespass upon land is the unauthorized entry of one person upon the land of another, and whether the trespasser supposed it to be his own or a third person's land makes no difference.
2. The English statutes of 43 Elizabeth and 22 and 23 Charles II, and 8 and 9 William III, regulating costs in actions of trespass, are not in force in this District. The plaintiff is entitled to full costs whether the trespass was willful or not, or whether the damages are nominal or not.

Law No. 2,742, Decided May 27, 1867.

ACTION of trespass q. c. f. The verdict was for the defendant under the instructions of the Court. Motion by plaintiff for a new trial on a bill of exceptions.

THE FACTS are stated in the opinion.

MESSRS. MERRICK and LOVEJOY for plaintiff.

MR. W. Y. FENDALL for defendant.

MR. JUSTICE FISHER delivered the opinion of the Court:

This case comes up on a bill of exceptions taken by the plaintiff on the trial of an action of trespass *quare clausum fregit*, the plea being not guilty and issue joined.

At the trial the plaintiff's title to the *locus in quo* was admitted and it appeared from the testimony that the defendant had occupied the adjoining lot and premises, and used as a wood house a shed which had been built partly upon the plaintiff's land by the defendant's predecessor and fastened to the plaintiff's house, but that the defendant was ignorant of the fact that the shed was in part upon the plaintiff's land, and that he never had any notice of it until the bringing of the suit. Upon this state of facts the judge

below directed a verdict for the defendant to which the plaintiff excepted.

That this was erroneous is obvious from the mere statement of the case and nature of the action of trespass.

A trespass is simply an unauthorized entry by one person upon the land of another, and it can make no manner of difference whether the person making the unauthorized entry knew it was the land of the plaintiff or supposed it to be the land of a third person or supposed that it was his own land. The question is not what he knew or supposed in reference to the ownership of the land; but was it in fact the land of another, and not his own and did he go upon it without authority or license from the lawful proprietor? If he did he committed a trespass, although it might be but a technical trespass entitling the owner to merely nominal damages.

The remedy for this unauthorized entry upon the land of another is the action of trespass *quare clausum fregit*.

If instead of pleading the general issue the defendant had pleaded specially that he did enter the plaintiffs close without license, but that when he did so he supposed he was upon his own premises having no knowledge of the fact that the shed had been erected in part upon the plaintiff's land this plea would have been held bad on demurrer simply because the want of knowledge or notice is no defense to the action. The law makes it the duty of every man to know where he is going and holds him responsible for even ignorantly going without license upon the premises of another. The very gist or substance of the action is that the defendant enters the plaintiff's close without license and not that he knowingly or with notice made such entry. In 2 Greenleaf on evidence (2d edition), S. 622, it is expressly stated that "it will not be necessary for the plaintiff to prove that the act was done with any wrongful intent, it being sufficient if it was done without a justifiable cause or purpose, though it were done accidentally or by

mistake. So, also, in 1 Chitty on Pleading, 192 (7th ed.). So, in the cases of Covall *vs.* Lorrington, 1 Campbell, 497, in Colwill *vs.* Reeves, 2 *Ib.*, 575, in Basely *vs.* Clarkson, 3 Living, 37, in Higginson *vs.* York, 5 Mass., 341, and in Heydon *vs.* Shed, 11 Mass., 500; and in the case of Geville *vs.* Swan, 19 Johns., 38, where the owner of a balloon accidentally descended into the plaintiff's garden he was held liable in trespass.

In order to prevent vexatious and trifling suits in trespass the Parliament of Great Britain enacted 43 Elizabeth and 22 and 23 Charles II, which provided that in cases of trespass where the jury should assess the damages to be less than forty shillings, the plaintiff's costs allowed by the Court should not exceed the damages assessed unless the judge presiding at the trial should certify that the freehold or title to the land was chiefly in question. Afterwards by 8 and 9 William III it was provided that in all cases of trespass in which it should appear that the trespass was wilful and malicious and the judge should so certify, the plaintiff was allowed his full costs notwithstanding the trifling character of the suit or the amount of damage assessed. In the construction of this last act every trespass was taken to be wilful where the defendant had notice. And it is only in the construction of this latter statute that notice appears to be in any wise involved as a matter to be proved. But as neither this nor the preceding statutes were ever of any force or applicability in this District, or in the State of Maryland, of which it was once a part, it is rather difficult to conceive the necessity of proving notice in order to maintain a suit for trespass, especially where the title is chiefly in question and merely nominal damages ought to be recovered.

The judgment below is reversed with costs.

A. G. ALDEN

vs.

JOHN W. HINTON.

- 
1. The Commissioners of Election are liable in damages to the aggrieved party if they refuse or suspend his vote on a mere vague and capricious challenge unsupported by reasonable proof; yet if such challenge be supported by evidence sufficient to engender an honest doubt in the minds of the commissioners, it would be the duty of the person tendering his vote to relieve that doubt by his own oath and such other proof as he could reasonably obtain.
  2. The registry of the party's name and proof of his having paid the requisite taxes are not conclusive of his right to vote, but the commissioners may lawfully go behind the registry and tax receipt, and inquire as to his citizenship and residence if they honestly doubt either of these.
  3. Judicial discretion is the option which a judge may exercise between the doing and not doing a thing, the doing of which cannot be demanded as an absolute right of the party asking it to be done.

Law No. 1,899. Decided June 1, 1887.

MOTION for a new trial on exceptions taken to the rulings of the Court in an action on the case to recover damages, because of the defendants refusal, as Commissioners of Election, to receive his vote.

THE FACTS are stated in the opinion.

MR. A. G. RIDDLE for plaintiff:

The Court having charged that registration and payment of school-tax made a *prima facie* right to vote, requiring a challenge to be supported by proper showing to defeat that right, and the challenger failing to make any showing in support of his challenge, the Court erred in saying the defendants could exercise any discretion to reject the plaintiff's vote.

The defendants had no discretion in the premises, and to reject the plaintiff's vote was wrongful, for which the action could be maintained, and that it was error to instruct the jury that the plaintiff must prove actual malice to enable him to sustain his action. That should only be considered in estimating the damages.

Laws referred to: Sections 5 and 6 of the act of May 13, 1820, 3 Stats., 583; sections 3, 4 and 5 of act of May 17, 1848, 9 Stats., 223; section 11 act of May 30, 1849; Corp. Laws, 39; act of October 17, 1850.

MR. JOSEPH H. BRADLEY, for defendants:

This case comes up on exceptions to the ruling of the Court below, which are fully stated in the record and cannot be very well abbreviated.

As to the first point made by plaintiffs in error, the defendants say:

First. The list furnished to the commissioners of election cannot be conclusive proof.

1. It does not show how long the parties have lived in the city or in the ward, or that they are citizens of the United States, or whether they are lunatics, or persons under other disabilities to vote, yet chargeable with taxes.

2. That the commissioners are necessarily, by virtue of their office, charged with the duty to pass on these questions.

And as to the second and third grounds assigned as error, they say the commissioners, being charged with the duty to receive the votes, and to decide the question of the right of the party claiming to vote, they cannot be made responsible for any error of judgment in discharging that duty; and no action will lie in such case unless the party charged has acted therein wilfully, maliciously, or corruptly, to the injury of the party complaining.

The case of *Dinsman vs. Wilkes*, 7 Howard, 129 to 133, and the authorities there cited are supposed to have settled the law on this subject.

MR. JUSTICE FISHER delivered the opinion of the Court:

In this case the plaintiff brought suit against the defendants to recover damages for their refusal as commissioners of election, holding the election for the first precinct of the seventh ward of this city on the fifth day of June, 1865, to receive his vote. It was proven on the trial, by both parties, that the defendant acted in the capacity of commissioners at said election, that the plaintiff offered his vote and that the same was refused by the defendants. It was proven by the plaintiff at the trial that his name stood at the head of the list of registered voters for said precinct; that he was a free white citizen of the United States, born in the State of New Hampshire, and had resided in the city of Washington for some fourteen years with the exception of some two or three years during which he was absent from the city and had regularly exercised while residing here his elective franchise. It was also shown by the plaintiff at the trial that he had paid all the taxes required to be paid by him under the law and that he had, in fact, all the qualifications of a legal voter in the ward and precinct in which he offered to cast his vote. No countervailing proof of disqualification was tendered by the defendants at the trial. It was also proven by both sides that upon offering his ticket, the plaintiff's right to vote was challenged by a by-stander who alleged that he believed that the plaintiff was an Englishman and not naturalized. The only material facts which were at all controverted between the parties at the trial, were, first, as to whether the plaintiff on his vote being challenged for want of citizenship, was willing to take an oath that he was a citizen of the United States, or to furnish other proof of his citizenship in order to satisfy the commissioners upon that point, and second, as to the custom or usage of the commissioners of election in requiring proof of citizenship from parties whose names appeared upon the list of voters and who exhibited evidence of having paid the requisite taxes to enable them to vote when



their ballots were challenged. Upon these points the evidence adduced at the trial was conflicting, the plaintiff showing by his proofs that in other cases similar to his own during said election, two persons whose votes were challenged were permitted to deposit their ballots without any regard to said challenge or the production of any evidence of their right to vote other than such as was presented by himself in support of his right; he also gave in evidence at the trial that he proffered to the commissioners to make affidavits of his nativity, or to produce the affidavit of a respectable citizen who had known him for many years as a resident of Washington; that said citizen had so known him and believed him to be a native born citizen of the United States, and that said commissioners would not agree to receive such testimony. On the other hand, the defendants proved that the commissioners were willing and offered to receive the plaintiff's own affidavit of his citizenship, but that the plaintiff refused to make it. The case being thus presented to the jury on either side, the plaintiff prayed the Court to instruct the jury as follows: 1st, that if they should find that at the election mentioned in the declaration the name of the plaintiff appeared on the pole list of the voters of said precinct and ward, and that when he offered his vote to the defendant's commissioners of said election, he also produced the required proof in due form of his having paid a school tax and personal tax for the year last preceding, he was then entitled to have his said vote received, and said commissioners had no discretion to reject the same. 2d, that if the jury find that at the time when the plaintiff offered his said vote to the defendant's commissioners of election, his name was contained on the list of the qualified voters furnished to said precinct and ward by the register of the City of Washington then before said commissioners, and that he also produced the usual legal proof of his having paid the school tax and personal tax for the year preceding, he was entitled

to have had his vote received by the defendants, unless his right to vote had been challenged, on a sufficient ground, showing his incompetency to vote, and unless said ground of objection was made to appear by reasonable evidence. The first of these prayers was refused by the Court below, and to that refusal the plaintiff excepted: the second was granted and to that the defendants excepted. The judge below, in his general charge to the jury, among other things, instructed them as follows: "The action here is brought against officers, exercising necessarily more or less discretion in the discharge of their duties. There is an appeal under some circumstances to the exercise of this discretion and they are often called upon to deliver judgment under debatable facts; and I here say to you that the law in this case and in all other cases is, that when an officer is charged with deliberative and discretionary judgment and he is called upon to account for the manner in which he has exercised that judgment, his error of judgment, honestly made does not charge him with liability; the law fixes his responsibility upon altogether a different rule. The law does not contemplate in any officer, immaculate judgment; such does not belong to human nature. Erring judgment is contemplated in the theory of the law and from the necessity of our condition as imperfect beings. All that the law exacts of him in this respect, is that he shall exercise his judgment to the best of his ability and with honesty of purpose. This is the duty enforced by the law. It is contended in this case in behalf of the plaintiff, that the defendants did not do it and on behalf of the defendants, that they did do it. The law of that issue is this: if you find the proof that the defendants exercised their discretionary power over the ballot box on the occasion of that election, with honest purpose and with a view to do justice to the electors of that precinct, they are not chargeable and are entitled to your verdict of acquittal. If, on the other hand, you find from the testimony, that they exercised their discretionary duty in this

behalf, reckless of the rights of the elector and with a purpose to promote the success of one party at the expense of another, and at the still further expense of an honest and upright discharge of their duty, you will find them liable." To which portion of the charge, the plaintiff also excepted.

It is doubtless true as matter of law, that the existence of the plaintiff's name upon the registered list of voters for the precinct where he tendered his vote, together with satisfactory proof of his having paid the school and personal tax assessed against him for the preceding year, was *prima facie* evidence of his qualification and of his right to have his vote received and counted at the election; but it was not conclusive proof.

Under the law of this District, as it then existed, the commissioners of election were not only charged with the duty of receiving votes (when satisfied of the identity of the person offering to vote) and depositing the tickets in the ballot box and at the close of the election ascertaining the state of the vote and certifying the same, as is now the duty of the commissioners of election under the present law, but the further duty was devolved on them to ascertain whether each and every person whose name stood upon the list of voters was entitled to the elective franchise. In absence of proof to the contrary, the party offering his vote and showing the payment of the necessary taxes was presumed to be a qualified voter. The mass of persons whose names are set down upon the list of voters were born in the United States. They are all presumed to be native born until the contrary shall be made satisfactorily to appear; but if a party, presenting himself at the polls, should be challenged because of a foreign accent upon his tongue, or other proof should be adduced showing a strong probability of his foreign birth, it would then be plainly his duty to offer evidence of his citizenship, either by nativity or by naturalization, and that evidence should be the best of which the nature of the case will admit. His own oath of such citizenship would certainly

not be a hard requirement. Whilst we hold that it would be culpable to refuse or suspend his vote upon a mere vague and capricious challenge unsupported by reasonable proof, yet if such challenge be supported by evidence sufficient to engender an honest doubt in the minds of the commissioners, it would be the duty of the person tendering his vote to relieve that doubt by his own oath and such other proof as he could reasonably obtain. Believing, therefore, that the registry of the plaintiff's name and proof of his having paid the requisite taxes are not conclusive of his right to vote, but that the commissioners might lawfully go behind the registry and tax receipt, and inquire as to his citizenship and residence, if they honestly doubted either of these, we do not think that the Court below erred in rejecting the first prayer presented by the plaintiff's counsel.

The exception taken to the granting of the plaintiff's second prayer, by the Court below, having been waived by the defendant, it is unnecessary for us to say more concerning it than simply to remark that the ruling was correct.

If our reasoning be correct in regard to the first exception taken to the ruling of the Court below by the plaintiff, it necessarily follows that the exception taken by the plaintiff to the charge of the Court on giving the case to the jury is also not well founded. It is true that in the charge a mere verbal error may have occurred in the use of the words "discretion" and "discretionary power." By these terms is meant the option which a judge may exercise either to do or not to do that which is proposed to him that he shall do; and the exercise of option on his part will work no wrong or injustice to anybody. To exercise discretion is to choose between the doing and not doing a thing, the doing of which cannot be demanded as an absolute right of the party asking it to be done. The proposition for the exercise of judicial discretion is always based upon a given state of facts and addresses itself to the favor of the judge. It is not based upon the right of the party

seeking to have the thing done founded in the law applicable to the facts involved, but is always an appeal *ex gratia*. It is true in this case that if the plaintiff when offering his vote at the election in 1865 had made it satisfactorily to appear that he possessed all the qualifications of a legal voter, then the commissioners of election could exercise no discretionary power whatever. It would have been in that case, the duty of the commissioners to have obeyed the peremptory mandate of the law and to have received and counted his vote; but as they were honestly in doubt as to his legal qualifications, then they had the right to reject or to receive the vote as their conscience and judgment should dictate; and this, we conceive, is the fair construction and interpretation of what the judge below said to the jury in that portion of his charge to which the plaintiff has excepted. We are, therefore, of the opinion that there is no such error apparent upon the record as will entitle the plaintiff to a reversal of the judgment. Whatever error may have been committed by the jury in weighing and estimating the testimony in the cause, we think the Court committed no wrong in the instructions given to the jury as to the law applicable to the facts involved in the cause. We think that in this case, the plaintiff mistook his remedy in excepting to the ruling of the judge below. If he had any remedy we think it was to have been found in a motion to set aside the verdict of the jury as being against the law and evidence.

The judgment below is affirmed.

EDWARD SWAN

vs.

ALONSON MOREHOUSE.

1. The plaintiff being the holder of a promissory note secured by deed of trust upon lands in Alexandria County, Virginia, made another trust deed, further securing it upon lands in the District of Columbia and then passed it to M., the defendant. The latter deed recited that "whereas the said S. is anxious to give to the said M. further and additional security for the payment of the said note in case the same is not realized from and under the aforesaid deed of trust on the lands in Alexandria County, now, &c." In a subsequent clause of the same deed it was provided that "if the said promissory note is not paid when the same shall become due, or be not within sixty days thereafter realized from and under the first deed of trust" then the trustee (in the second trust) should sell. It was contended that the latter trustee was not authorized to sell the lands in the District until the remedy was exhausted upon the land in Virginia, but it was held that the deed was to be construed as meaning that if the note was not paid at maturity or payment was not in some way obtained out of the land in Virginia within sixty days after the maturity of the note the trustee might sell.
2. The rule that the language of a deed shall be taken most strongly against the grantor is not to be resorted to unless all other rules of interpretation fail.

In Equity No. 445. Special Term, March 22, 1864. Affirmed in General Term, June 13, 1867.

BILL in equity for an injunction to stay a foreclosure sale under a deed of trust.

MR. EDWARD SWAN, for plaintiff.

MR. WM. B. WEBB, for defendant.

MR. JUSTICE OLIN delivered the opinion of the Court.

The bill in this case was filed praying for an injunction to stay the sale of certain real estate, under two deeds of trust, one executed on the 15th of December, 1856, upon certain lands in this District to Wm. B. Webb to secure the

payment of a promissory note for \$600, made by one Estwick Evans payable to the complainant, and at the time of the execution of said deed by him indorsed and transferred to the respondent Morehouse. The other deed of trust was executed on the 26th of August, 1857, by the complainant to E. C. Morgan, to secure the payment of three certain bonds each for the sum of \$344.92, payable to Wm. B. Webb, trustee, and which bonds were held by the complainant by assignment.

In reference to the first deed of trust it is alleged in this bill that the transaction was a loan of money by the complainant from the respondent Morehouse, and was usurious and void, and that interest at the rate of 12 per cent. per annum was corruptly agreed to be paid thereon. This claim was however abandoned upon the hearing where it appeared, if not fully in the pleadings, that the note in question was executed by Evans to the complainant in consideration of the purchase of certain real estate by the former from the complainant. The note therefore, being what is popularly termed "business paper" might be sold or transferred for half its face without any violation of the statute against usury. This note while held by the complainant was secured by a deed of trust upon certain lands situated in Alexandria, Va.

On a motion for an injunction in this cause, a conditional injunction was granted, providing that all proceedings to effect a sale under the deeds of trust be stayed upon the payment into Court of the sum of \$500. This latter sum paid and overpaid all the amount found due by the auditor to whom the matter was referred by the Court to ascertain and state the indebtedness between the complainant and the respondent Morehouse.

The only question about which I have felt any embarrassment, arises out of the language of the trust deed executed by the complainant on the transfer of the \$600 note to the respondent Morehouse. This note was also secured by

a trust deed executed by Evans to Wm. B. Webb for the benefit of the complainant Swan upon certain lands situated in Alexandria, Va. It is insisted in the complainant's bill and was on the argument of the cause, that by the terms of the trust deed executed by the complainant Swan, the trustee was not authorized to sell the lands in this District until the remedy was exhausted upon the lands in Virginia or Alexandria. The following clauses in the second trust deed are the only ones upon which this question can be raised. The first is contained in the recital of the deed, viz:

"Whereas the said Edward Swan has passed to Alonson Morehouse a certain promissory note dated on the 3d of May, 1856, for the sum of six hundred dollars drawn by a certain Estwick Evans in favor of the said Edward Swan, and payable three years after date with interest, the said promissory notes being given by said Estwick Evans for part of the balance of the purchase money due to the said Edward Swan for the sale of a tract of forty acres of land sold to him by the said Swan situated in Alexandria County, in the State of Va., which said note is already secured by a deed of trust on said land, and whereas the said Edward Swan is anxious to give to the said Alonson Morehouse further and additional security for the payment of the said promissory note in case the same is not realized from and under the aforesaid deed of trust on the lands in Alexandria County. Now, &c."

In a subsequent part of the deed wherein is declared the trust upon which it is executed, is the following language:

"And upon the further trust that if the said promissory note is not paid when the same shall become due, or be not within sixty days thereafter realized from and under the deed of trust given by the said Estwick Evans and wife on the forty acres of land in Alexandria County, Va., then the trustee Webb may sell, &c."

After a somewhat careful examination of the question of



the true construction and meaning of the trust deed executed by Swan, I am inclined to think that the first recited clause of the deed does not control and render of no effect the clause last cited. Although the recital says, Swan is anxious to give Moorehouse further and additional security for the payment of the said promissory note in case the same is not realized from and under the aforesaid deed of trust on the lands in Alexandria County, I do not think that that language should control the subsequent and express terms of the deed wherein it is stated, that if the note be not paid at maturity or be not within sixty days thereafter realized under the deed of trust given by Evans and wife, then the trustee may sell, &c.

It will be observed that the note in question was made by Evans to Swan. Evans had executed also a deed of trust to secure its payment. Evans was primarily liable for the payment of this note, and I think it would be a fair construction of the language of this deed to hold that the parties meant by it, that if Evans did not pay the note at maturity or payment was not in some way obtained out of the lands in Alexandria within sixty days after the maturity of the note, then the trustee might sell, &c. Any other construction of the deed would expressly contradict the latter clause of the deed, and interpolate in the former clause "in case the same (the amount of the note) is not realized by a *sale* of the property in Alexandria covered by the trust deed."

In coming to this conclusion, I have not resorted to that rule of interpretation or construction which says the language of a deed shall be taken most strongly *against the grantor* a rule of doubtful propriety, and never to be resorted to unless all other rules of interpretation fail, but to that more sensible rule which gives effect to all parts of the deed each consistent with the other.

As it appears by the auditor's report in this case that the money secured by the Moorehouse deed was more than paid

by the deposit of \$500 in Court as a condition upon which the injunction was granted, and that after deducting that amount there was due the respondent on the 4th of May, 1866, the sum of \$638.33, I think a decree should be entered that the complainant pay that amount and interest thereon together with the costs of this suit within twenty days, or in default thereof the respondent Moorehouse have execution for the costs of this suit against the complainant Swan and liberty to proceed and sell the property covered by the trust deed executed by the complainant to Webb situated in this District.

I have had some little doubt upon the question of the propriety of charging the complainant with the costs of this suit. I would not do it but from the fact that the trustees in this case have followed a practice which seems to be all but universal in this District, of omitting to state in the advertisement of sale the amount due or claimed to be due under the deed of trust. These deeds of trust are often made an engine of oppression and liable to gross abuse. I should regard it a proper exercise of the powers of this Court to stay by writ of injunction any sale by a trustee wherein it was not stated in the advertisement of sale the amount due, under and for the payment of which the party proposed to sell the property.

## THE MAYOR OF WASHINGTON

vs.

BARNES.

---

The power to lay a tax on commerce in the form of a tonnage duty on vessels is vested in Congress alone; hence an ordinance of the corporation of Washington which, under the name of "harbor fees," imposes such a duty on vessels coming to its port is void.

Decided October 24, 1887.

CERTIORARI to a justice of the peace to review a judgment rendered against the defendant for the amount of certain harbor fees sued for by plaintiff.

THE CASE is fully stated in the opinion.

MESSRS. BRADLEY & BRADLEY, for plaintiff.

MR. R. S. DAVIS, for defendant.

MR. JUSTICE WYLIE delivered the opinion of the Court:

This case comes before us on *certiorari* to F. A. Boswell, one of the justices of the peace of this city, who has rendered judgment against the plaintiff in error for the amount of certain harbor fees sued for by the corporation under the following ordinance:

"Be it enacted, &c., That Section 2 of the act entitled 'An act for the appointment of a harbormaster and for other purposes' be so amended that the harbor fees to be collected by the harbormaster shall be as follows: On all vessels of 50 tons and under, 50 cents," &c.

The plaintiff in error, of the sloop *Nautilus*, a vessel of less than 50 tons burden, engaged in the coasting trade, and although the judgment against him was for the small

amount of 50 cents and costs, yet he has considered it his duty to bring the case before us for the purpose of testing a question which is of general concern to all vessels visiting this port. Section 10 of Article I of the Constitution of the United States declares: "No State shall, without the consent of Congress, lay an import, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imports laid by any State on imports or exports shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of Congress."

It further declares that "no State shall, without the consent of Congress, lay any duty on tonnage," &c.

The first question for our determination is whether these "harbor fees," as they are called in the corporation law, are duties of tonnage which the corporation is prohibited from collecting without the consent of Congress.

In the English law *tonnagium* (tonnage) was a custom or impost upon wines and other merchandise exported or imported according to a certain rate per ton (Bouvier's Law Dict., citing Spellman). Tonnage and poundage were ancient duties levied upon every ton of wine and ton of other goods imported and exported, and were the origin of customs. They commenced in England about the 21st of Edward III (1346). They were granted to the kings of England for life, beginning with Edward IV. At the beginning of his reign, Charles First gave great offense by levying them on his own responsibility. They ceased in 1789 (Hayden's Dic. of Dates).

Blackstone says: "Tonnage was a duty upon all wine imported over and above the prisage and butterage aforesaid. Poundage was a duty imposed *ad valorem* at the rate of 12*d* per pound on all other merchandise whatever." But he adds, these distinctions are now in a manner forgotten,

except by the officers immediately concerned in this department; their produce being in effect blended together under the first denomination of customs (1 Com., 315).

Worcester, quoting the Quarterly Review, says: "The custom house duties, or, as they are called, tonnage and poundage, has, since the time of Henry VI, been granted to successive sovereigns for life. The ancient meaning, therefore, of duty of tonnage which applied only to wines imported according to a certain rate per ton at the time of the formation of our Constitution had been lost, and a duty on wines by the ton was no longer designated specially by that term, but as Blackstone says, had become blended with poundage, under the first denomination of the customs."

The modern meaning of the word "tonnage" is given correctly in Wheaton's Law Dictionary. (See Bouvier's Law Dict., Maritime Law): "The capacity of a ship or vessel. The duties paid on the tonnage of a ship or vessel are also called tonnage."

Story, in his commentaries on the Constitution, also employs the word in this sense, and does not even refer to any doubt whatever as to the meaning of the term, but quotes the Constitution (incorrectly indeed) as employing the term "duty on tonnage" instead of "duty of tonnage."

Many acts of Congress are to be found, some of them now in force and others repealed, which contain legislation on the subject of tonnage duties, or duties of tonnage, and these all without exception, it is believed, have used these terms as meaning a tax imposed upon a vessel in proportion to its burthen.

It is manifest, also, both from the context of these words in the Constitution itself, as well as from the debate upon them at the time they were before the convention, that it was the intention of the framers of the Constitution that Congress should have the right of exclusive legislation over this whole subject, both as to the tax on imports and ex-

ports, as well as over the vessels employed in their transportation.

It would have been gross inconsistency in the Constitution had it conferred on Congress the right of exclusive legislation as to duties on imports and exports, and left to the several States the right to lay taxes on the vessels engaged in the conveyance of those imports and exports.

It follows, therefore, that the ordinance in question is a violation of the Constitution of the United States, unless it can be shown that Congress has by some act plainly authorized the corporation of Washington to levy a "duty on tonnage."

It is admitted that such power is nowhere expressly granted.

But the power is supposed to have been conferred by implication from the provisions of the charter of 1820, or from some one of them.

"To preserve the navigation of the Potomac and Anacostia rivers, adjoining the city."

"To erect, repair and regulate public wharves, and to deepen creeks, docks, and basins."

"To regulate the manner of erecting and the rates of wharfage at private wharves."

"To regulate the stationing, anchorage, and moving of vessels."

And the following in section 8:

"And to pass all laws which shall be deemed necessary and proper for carrying into execution the powers vested by this act in said corporation or its officers."

We think it too plain for much argument, that the powers in question are not to be found in either or all of these grants. The charter contains other provisions designating clearly what powers over, and what subjects of satisfaction shall belong to the corporation. From and by these alone it must collect the funds with which to carry on the city

government and discharge its duties to the public. The power to lay a tax on commerce in the form of a duty on tonnage, has never been parted with by Congress to any of the States, and we find no ground whatever to believe that it has ever been granted to the corporation of Washington.

The fact that the tonnage of all vessels coming to this port imposed by this ordinance are insignificant in amount in any one instance, and is called "harbor fees" can have no influence whatever on the decision of the question. The tax is substantially a duty notwithstanding it is called by a different name, and if it is small at present, and the right be sustained by the Court, it may be increased hereafter to an extent regulated only by the discretion of the authorities of the city. The judgment of the justice must be reversed.

JOHN F. MAY

vs.

MARY E. SCHOFIELD ET AL.

- 
1. A Court of Equity will not aid anyone in an attempt to enforce a legal right, which he can only obtain by a violation of conscience.
  2. A tax deed which was procured in pursuance of a fraudulent arrangement between the original owner and the tax deed holder to suffer the property to be sold for taxes in order to defeat the creditors of the owner, will be set aside as a cloud upon the title at the suit of a purchaser under a decree made in a creditor's suit.

In Equity No. 1816, Rules 6. Decided October 24th, 1887.

APPEAL from a decree on a bill filed to quiet title.

THE FACTS are stated in the opinion.

Mr. ROBT. J. BRENT, for complainant.

Messrs. NORRIS & COOMBS, for defendants.

Mr. JUSTICE WYLIE delivered the opinion of the Court:

The object of this suit is to obtain a decree to quiet the title of the complainant to lot No. 8 in square No. 456, in this city, of which he is now in possession. The title of complainant is shown to be as follows: The legal title to the lot was held by William Robinson in trust for Mrs. Alice C. Jennings, both citizens of the State of Virginia. They united in making a lease of the lot to John F. Callan, dated 2d November, 1840, for the life of Mrs. Jennings, at an annual rent of \$200, and with privilege to Callan to purchase the fee for the consideration of \$3,000, the election to buy to be exercised, prior to the expiration of ninety days after the death of Mrs. Jennings, and Callan to pay all taxes.



Mrs. Jennings died in 1851, and Robinson the trustee had died before her. The \$3,000 were not paid by Callan within the period limited by the lease for his purchase of the property, but the time was extended by agreement between him and those intrusted on the other side. A suit was brought in the Circuit Court of Norfolk County, Virginia, wherein Amanda C. Jennings was complainant and John F. Callan and others, were defendants, and a decree was passed on the 10th June, 1857, by which, amongst other things, it was adjudged, &c., that "the defendant John F. Callan, deposit in the Norfolk Savings Institution to the credit of this cause, within thirty days after he shall have been served with this decree the sum of \$3,000, with interest from the first day of January, 1856, being the amount due by him under his contract with William Robinson and Alice C. Jennings, bearing date the 2d day of November, 1840, a copy of which is filed as an exhibit with the bill marked 'D.'"

In 1854 Callan had made a deed professing on its face to convey his interest under this contract to Michael P. Callan, one of his brothers. Accordingly, the three thousand dollars and the interest thereon, according to the decree, were ostensibly paid by Michael P. Callan, as assignee of John F. Callan, but no deed was ever made by the heirs of Mrs. Jennings, or of Robinson, her trustee, conveying the legal title to the property to either of the Callans, or any one else so far as the evidence in this case shows.

John F. Callan, at the date of the conveyance to his brother Michael, was much embarrassed in his circumstances, and at the suit of creditors commenced in 1855, this conveyance was found on trial to have been without consideration, and void for actual fraud. The cause was taken to the Supreme Court of the United States, and the decision below was there emphatically affirmed at the December Term, 1859. Under the decree in this case, the interest of John F. Callan in the lot in question was levied on, and at the sale was purchased by the complainant for

the sum of \$23,100, and having complied with the terms of sale, by paying the full amount of the purchase money, he was put into possession under an order of the Court. This order was, also, taken to the Supreme Court by appeal, but the appeal was dismissed.

The heirs and representatives of Mrs. Jennings were made parties defendant along with John F. Callan in the suit by the creditors of the latter to set aside the fraudulent conveyance made by him to his brother Michael, and for a sale of the property. And the complainant having purchased the property at the marshal's sale, under the decree in this case, he now holds both the legal and the equitable titles to the property, and has a good right to come to this Court to have any cloud upon his title removed, if it be but a cloud. The cloud upon his title which he now seeks to have removed by decree of this Court, arises out of a tax sale made on the 11th day of April, 1853, for the unpaid taxes of 1850, 1851 and 1852, when the property was bought by Nicholas Callan, a brother of John F., for the sum of \$255, the property at that time being worth \$15,000. Two years afterwards, and when the period for obtaining his tax deed from the corporation was about to be fulfilled, Nicholas assigned his certificate of purchase to Mary E. Schofield, one of these defendants, for the professed consideration of \$300, and on the 16th of April, 1855, she obtained the deed from the corporation.

Michael Callan, the other brother, to whom John F. had made his conveyance of the same property in 1854, and which had not been called in question by creditors, made no attempt to redeem it from the tax sale, although it was of the first importance to him to do so if the tax sale had been anything else than another branch of the fraud contrived against the creditors of John F. Callan. Mary E. Schofield herself was also a member of the same family, the sister of John F. Callan's wife, and an inmate of his family at the time. In the mean time, and in fact up to 1860,

when he was removed from the possession under a writ of possession in favor of the complainant, issued in the suit of the creditors, John F. Callan remained in actual possession of the property, receiving the rents and profits and liable for the taxes:

The Norfolk decree shows that John F. Callan had paid the interest on the \$3,000 due the heirs of Mrs. Jennings up to 1st January, 1856, one year nearly after Mrs. Schofield had obtained her tax deed from the corporation.

It is not denied that he remained in possession receiving rents and profits from the property and paying no rent either to his brother Michael or to Miss Schofield; nor does it appear that either of them ever claimed to have the possession or asked him for rent.

The taxes on the property for the year 1853 and subsequent till 1858, inclusive, were all paid by Miss Schofield, as she alleges in her answer, notwithstanding she was in the enjoyment of neither the rents nor the possession of the property, all of which she allowed to go to her brother-in-law, John F. Callan, without a complaint. All these circumstances taken together in our view, amount to very strong evidence, that the sale for taxes, the purchase by Nicholas Callan, the transfer of the certificate of purchase to Miss Schofield and the payment of the taxes by her subsequently, were continued (like the deed to Michael which the Courts have already pronounced to be fraudulent) by these brothers and this sister for the purpose of enabling John F. Callan to defraud his creditors, if not also the heirs of Mrs. Jennings, and no account having been given on the subject by the Callans or by these defendants we think it is reasonable to presume that whatever money was required to carry out the scheme was supplied by John F. Callan, who was allowed by them all to manage and control the property as his own, and to receive the rents and profits without ever having been called to account, so far as appears in the case before us.

We think, therefore, that the tax sale to Nicholas Callan in 1853, and the subsequent assessment of his certificate to Miss Schofield, and the deed made to her from the corporation, were all acts in trust substantially for John F. Callan.

At best tax sales are apt to meet an unfriendly reception in a court of equity. There are very few of them which an honest man can insist upon. Through mistake, or accident, or the failure of the letter, or the infidelity of a tenant, or an agent, property worth many thousands may be sold at tax sale for less than a score of dollars, and the owner be kept in ignorance of the fact until the deed has been made and the property lost. How dare the purchaser of such property show his face in a court of equity, asking its assistance to uphold his title. His case belongs to a court of law, where he must go, or nowhere, for what he calls his rights. We do not say that a court of equity will in no possible case assist a tax purchaser, for we cannot foresee all things which are to happen. But we do say that a court of equity will never either aid or countenance any one in attempting to enforce a legal right, which he can only obtain by a violation of conscience.

But on the other hand a court of conscience moves with alacrity and exerts all its powers when called to assist and protect the cause of fairness and integrity, in their contest with secret covin and fraudulent attempts to deprive them of their rights. And there is no class of cases to be found in the Courts more suspicious and ill-favored, than those, like the present in which different members of the same family appear to have leagued together to protect by means of many divers and shifting contrivances to so entangle their property as to defeat the just claims of creditors of *bona fide* purchasers, especially when one of these contrivances is a tax sale, for less than a fiftieth part of the value of the property.

But there are two other parties defendant in this suit whose cases has not yet been considered. David L. Peugh and Samuel A. Peugh, his brother. The latter is not a sub-

stantial party in interest, but was only a friend of the Callans and the confidential adviser of Miss Schofield from the beginning, and of his brother David also who under his counsel, as he says, purchased the property in question from Miss Schofield in 1862. His answer favors us with his opinion in support of Miss Schofield's title, as also the opinion of at least one other gentleman of high standing at this bar, who is not named however, to the same purport. Although we have considered this opinion with sincere respect, it is our misfortune, perhaps, that we cannot bring our minds to the same conclusion.

David L. Peugh says he is a *bona fide* purchaser of the property for valuable consideration, without notice of any latent defect in Miss Schofield's tax title, and that she made her deed to him conveying the same in consideration of the sum of \$7,000.

Let us see how this is: the deed itself is before us. Its date is 19th June, 1862. It was not recorded until the 3d of December following. That, however, is not very important, as the six months had not quite expired. On its face the deed acknowledges the payment in hand of the whole amount of the purchase money. But Mr. Peugh's answer says that "after some negotiation and delay, this respondent finally consented to purchase the interest of said Mary for the sum of \$7,000, payable at a future day with interest; that a conveyance was prepared and executed by said Mary for the premises, and he, this respondent, executed and delivered his promissory note for the sum of \$7,000, and that said conveyance bearing date the 19th day of June, 1862, and duly recorded, &c., fully and truly exhibits the whole transaction, so far as this respondent is concerned."

Now the answer of Mr. Peugh does not furnish us with either a copy of this promissory note, nor with its description. It does not state whether the note was a negotiable note, or one not negotiable; whether it was payable absolutely or on the happening of a contingency. It does not

say whether it was payable in one year or two years after date, or at the Greek calends.

We are bound to presume, therefore, that this note was not negotiable, and that its payment can never be enforced unless Mr. Peugh should succeed in establishing a title to this property under his conveyance from Miss Schofield.

Nor does the deed to Peugh from Miss Schofield contain any warranty of title on her part.

We thus see that if Peugh's title should turn out to be worthless, there would be a failure of consideration for the note, and the deed and note would both become worthless together as would be quite fitting in such event.

Mr. Peugh then was not, as he seems to think, a purchaser in this case *bona fide* and for valuable consideration without notice and all the trouble taken by him and Miss Schofield, in the matter has not put them, or either of them, one step forward.

The case before us must be considered by us and decided precisely as though the deed to Peugh had never been made.

There are a number of other points in the case of more or less importance, but we prefer that our decision should rest on the broad grounds where we have placed it. The discussion of these questions, besides, would prolong the opinion to an unreasonable length, and consist principally of citations of authorities and extracts from decisions, on questions which it is not in our judgment necessary we should decide.

We have had some trouble in considering this cause to keep out of view the evidence contained in the case of the creditors against Callan and others, as the parties in this were different, as well as the objects of the suit. For one purpose, however, the record in that case was evidence in this, for the purpose, namely, of tracing the complainant's title, as purchaser under the decree in that case. But none of the evidence taken in that case for the purpose of estab-

lishing fraud on the part of the two Callan's John F. and Michael, has been used by us in our deliberations upon the present case.

The counsel of the complainant in consequence of having all that testimony connected with the record and that record given in evidence in this case for the lawful purpose indicated may have been misled into the belief that what was evidence there would be considered as evidence also in this; and we may thus account perhaps for the seeming scantiness of the testimony which has been taken in this cause.

Several questions, also, have been made in this case, which depend on the evidence in that, and for this as well as the other reason already stated, have not been considered by us here.

We think the tax title now held by David L. Peugh against the lot in controversy, was in the beginning one of the concoctions gotten up at the instance and with the means of John F. Callan, for the purpose on his part to defraud his creditors, and that he was knowingly aided in the attempt both by his brother Nicholas and his sister-in-law Miss Schofield, and that it would amount to an insult to justice to uphold this contrivance, by taking away from the complainant a property for which he has honestly paid the sum of \$23,100, which has all been applied to the benefit of John F. Callan in the payment of his debts, and handing it over to the parties claiming under the tax sale, made for less than two per cent. of its value at the time and glaring with all the wonted indicia of fraud. Complainant has shown his right to have this cloud removed from his title, and a decree will be entered up accordingly.

WILLIAM ADAIR ET AL.

vs.

O. H. BROWNING, SECRETARY OF THE INTERIOR.

---

An act of Congress for the erection of a jail in the District of Columbia detailed the manner in which the work was to be done, and provided that one-half the cost thereof should be paid by the Government, and the other half by a tax to be levied upon the persons and property of the District, and placed the execution of the law under the supervision of the Secretary of the Interior. On a bill for an injunction filed by certain citizens of the District, stating themselves to be interested as tax payers in the proper execution of the law, and alleging an illegal departure by the Secretary from the direction of the statute in the erection of the building, the Court, without deciding as to its power to enjoin at the proper time the collection of the tax if the building were erected in an unauthorized manner, *held*, that the bill in this case was premature and would only lie, if at all, when there was an attempt to collect the tax.

Equity 1074. Decided October 26, 1887.

BILL for an injunction. Certified to the General Term for hearing in the first instance.

THE FACTS are sufficiently appear in the opinion.

MESSRS. BURGESS & PIERCE and O. D. BARRET for complainants.

MR. CHIEF JUSTICE CARTER delivered the opinion of the Court:

The Court are unanimously of the opinion that the application for an injunction in this case is premature, and must, therefore, be denied.

It is not, however, because we are satisfied that the law has been complied with, or that there may not great mischief ensue to the public from the want of compliance that



we refuse the injunction; for, taking the allegation of the bill to be true, and for the purposes of this proceeding they must be so taken, we are forced to the conclusion that the law has not been complied with. What has chiefly ruled the mind of the Court in the determination it has resolved, is the conviction that at present the complainants, upon their own showing, have no standing in Court. The subject of the complaint does not bring them within reach of the relief they seek.

This law\* provides for the erection of a jail for the District of Columbia at an expense of \$200,000, and payment of one-half (\$100,000) is charged upon the District, the other half upon the Federal treasury. For the purpose of convenience, and perhaps economy, the bill provides for the payment by the Federal Government, out of the Federal treasury, of the whole amount, the treasury to be refunded one-half thereof by the District. The contribution of the \$100,000 by the District is made subordinate to the payment by the Federal treasury of the whole amount and is treated as a re-imbursement, it having been provided by the bill that contemporaneously with the progress of the structure, the Secretary of the Interior might compel the contributions of the moiety of the District by a tax on its citizens and property. This condition of the law raises the question at what period may the citizen of the District intervene for his protection from its violation, if he can interfere at all? Can he anticipate his liability to the impost, or is he postponed until the government functionary sees fit to enforce his contribution? Now, we think, if he is to have a standing in Court at all it comes with the contribution. He cannot take such standing in advance on a mere threatening. There must be a personal liability in fact. The burden must be direct and attach to him before he can make it available as a ground for legal interference. That time has not arrived. The attempt to collect taxes has not been

---

\*Act of July 25, 1866.

made, and a case has not matured for our interference if we are to interfere at all. The bill is therefore dismissed.

MR. JUSTICE WYLIE said:

I wish to add something to what has been said.

Congress provided for the erection of a jail here, and provided that the law should be carried into execution under the supervision of the Secretary of the Interior. It provided that the building should not cost more than \$200,000; that in the first place the \$200,000 should be paid out of the treasury of the United States, the treasury to be afterwards re-imbursed by taxes levied upon the persons and property of the District of Columbia under the direction of the Secretary of the Interior.

The bill in this case was filed by certain persons who allege that they are citizens of the United States and tax payers of the District of Columbia, and seeks to restrain the secretary from an illegal departure from the duty devolved upon him. This duty is not a mere ministerial proceeding, but an executive duty. Congress has the power to erect public buildings, to erect a jail, and devolves this duty upon the secretary to be discharged after a certain general plan. I think that the duty thus conferred is clearly executive under the admirable distinction between an executive and a ministerial duty as drawn by the Chief Justice of the Supreme Court in the recent case of the State of Mississippi vs. Johnson. "A ministerial duty is one in respect to which nothing is left to discretion. It is a simple definite duty, arising under the condition admitted or proved to exist and imposed by law."

We have no jurisdiction over the case in my opinion. These parties come here as tax payers. It is not said what kind of tax payers they are or how they are interested, whether it is themselves or the other parties who, according to the bill, are to come in hereafter, and who possess a tangible interest in the matter as tax payers. I do not know whether the complainants show themselves as having suffi-

cient interest to call out the action of the Court, but I do know that it has been held beneath the dignity of a Court of Chancery to act upon insignificant interests, such as in this country do not amount to fifty dollars, and in England to fifty pounds.

Again if these parties have a right to come here as tax payers of the District, they have the right to come as tax payers of the United States; the principle is the same. And then a secretary could not build a fort or a ship, or erect a court-house in any part of the country, but some disappointed contractor in some portion of the United States would appear by some friend in some one of the Circuit Courts seeking an injunction on the ground that the secretary had not complied with the law, and the result would be that Courts would be turned from judicial duties and become Executive Departments, appointing receivers, making contracts and superintending contracts, &c. I think the decisions quoted from New York were forced upon the Courts by the manifest and outrageous malpractices of the officials, and the pressure of public opinion. But these decisions have been rebuked and reversed by the Supreme Court.

It is only when the tax payer is himself subjected to some loss in consequence of the improper execution of the law that he can ask the aid of the Court. For illustration: If as in this case, Congress had provided a certain site for a jail on some public reservation, if the Secretary of the Interior failed to observe that provision of the law, and proceeded to seize private property by process of condemnation, or without process at all, then the owner of the property could come and claim an injunction. When an executive officer does not confine himself within the authority but abuses it to the direct detriment of a private individual, he can be enjoined.

## COLUMBUS ALEXANDER ET AL.

vs.

## HENRY DOUGLASS.

1. A tenant in common cannot purchase an outstanding tax title to the common property and hold it against his cotenants. In such a case he will be deemed to hold as trustee for the benefit of all.
2. But he will be allowed for whatever permanent improvements he may have placed upon the property whilst in his possession, as well as his costs and expenses in the purchase of the tax title, and be charged on the other hand for the use and occupation of the land.

Special Term. In Equity. No. 319. Decided November 18, 1887. Affirmed in General Term, February 8, 1888.

BILL in equity to remove a cloud from complainant's title to square No. 90 in the City of Washington.

THE FACTS are stated in the opinion.

MR. W. S. COX, for plaintiff.

MR. W. B. WEBB, for defendant.

MR. JUSTICE WYLIE delivered the opinion of the Court:

John Douglass, senior, died some years previous to the origin of the present controversy, intestate, and seized of square, No 90 in this city. The title descended to his three sons, John, Henry and William as coparceners, under the act of descents of 1786.

In 1855, White & Bro. obtained two judgments against William Douglass, amounting, with principal, interest and costs, on the 20th of June, 1864, to \$1,318.62.

Under these judgments or one of them rather, an execution was issued which was levied on the individual interest of William in this piece of land, and on the 20th of June, 1864; that interest was sold by the marshal to Columbus

Alexander, one of the complainants, for the sum of \$1,475 and the money was paid and the deed delivered.

Thus the property became vested in John and Henry Douglass and Columbus Alexander as tenants in common.

But Henry Douglass now, it seems, is seeking to repudiate this tenancy in common, by which he has an interest of one third only in the property, and sets up a claim to the whole under a tax title obtained as follows:

In 1860, the whole property consisting of three lots was sold for the taxes, when it was purchased by one S. H. Platt, and on the 20th of August, 1862, Platt obtained his tax deed from the corporation. The amount paid by Platt for the square was the sum of \$17.35 for land and improvements. On 29th April, 1864, Henry Douglass bought from Platt his tax title to this square, consisting of three lots, and also to four lots in square 91, for the sum of \$180—\$90 for each.

The question for decision is whether he can be permitted by a court of equity, thus to oust his cotenants in common, and get for himself this large property, worth many thousands of dollars, for ninety dollars paid to Platt, who had bought it for \$17.35 two years before.

If he can, this Court may as well cease its efforts to arrest fraud, and suppress injustice.

In the beginning, whilst the three brothers were all copaceners of the property, the taxes were allowed to remain unpaid for one year, and this was followed by the sale of the property to Platt. Whose delictum was it that this took place? It was the joint fault of the three, Henry one of them. It was his own business to see that the taxes were paid as much as that of either of his brothers. It was his duty to pay them and then compel contribution from John and William, and the law would have been prompt to aid him in such a case.

Had the property been bought in by himself at the tax

sale, he could not have pretended for a moment that he had a right to claim it as his own.

A coparcener, a partner, a tenant in common or joint tenant, in paying off a charge or incumbrance on the common property, does so for the common interest, and if he be compelled to use his own funds for that purpose, he can and must look to his fellow owners for contribution. He is a trustee for the common benefit. This doctrine cannot be questioned. It is laid down in all the text books, and has been declared in the recent case of *Rothwell vs. Dewees*, 2 Black R. 613.

Having by his own fault allowed the property to be sold for the taxes, and bought by Platt, his repurchase from Platt, was nothing more than the removal of an incumbrance or charge upon the lots, which it was as much his duty to effect as that of any of his cotenants. In Fonblanque's Eq. Book 2d., ch. 6 Sect. 5, he says: "Lastly a trust is revived by a repurchase of the trustee, although a fine passed, for it being but a conveyance, it did not extinguish or separate the trust, but transferred both together, and in the gift of the land he gives all the interests and demands by reason of the land. And so where a man wrongfully possesses himself of my goods, and sells them in market overt; if he afterwards buys these goods again, I may seize them in his custody, *Bovey vs. Smith*, 2 Ch. Ca., 126; 1 Vern. 60." This to be sure is an example of very refined and artificial reasoning in support of a plain and honest principle. But the principle must command our approbation, independently of these reasons, for its influence in support of justice and fair dealing, and in hostility to fraud and covin.

In 2 Story's Equity, Section 1264, the same doctrine is laid down. "Wherever a trustee is guilty of a breach of trust by a sale of the trust property to a *bona fide* purchaser, for a valuable consideration without notice, the trust in the property is extinguished. But if afterwards he should repurchase, or otherwise become entitled to the same prop-

erty, the trust would revive and reattach to it; for it will not be tolerated in equity that a party shall by his own wrongful act, acquire an absolute title to that which he is in conscience bound to preserve for another. In equity, even more strongly than at law, the maxim prevails, that no man shall take advantage of his own wrong. And, even at law, if a disseissor aliens the land, and a descent is cast, and afterwards the disseissor re-acquires the land by descent or purchase, the disseissor may re-enter, although otherwise the mesne descent cast would have barred his entry."

So it is said in Comyn's Digest T. Chancery (4 W., 25): "So though the breach of trust was passed, he who was guilty of the breach shall not take advantage of it." That tenants in common stand toward each other in the relation of trustees in respect to the common property, is laid down by the Supreme Court of the United States in *Rothwell vs. Dewess*, 2 Black, 619, in the following language: "The rule was based on a community of interest in a common title which created such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other in reference to the property so situated."

Besides these considerations, which are of themselves decisive of the controversy in this case, there is the additional fact that if Henry Douglass were now allowed to set up his tax title against these complainants, he would acquire a property from them for less than two per cent. of its probable value. In other cases that would be thought reason enough to induce a court of equity to set aside any sale, however regular it might appear on its face, and I do not see any satisfactory reason why the courts should permit flagrant injustice to be perpetrated in a case merely because a man's property was sold for taxes without notice to him except by a publication in the supplement of a newspaper, which he may never have seen and in a form which might well mislead him if he had seen it, when there has been no

personal demand made upon the owner himself for payment, and no proceedings against him as for a personal obligation, and no seizure of the property itself, or demand made upon the premises, as is required in all other cases *in rem*, before the property can be sold, even under a decree of a court of justice.

On the whole matter it is necessary that the defendant be decreed to hold his tax title in trust for the common benefit, in order that injustice and iniquity should be defeated, and the complainants just rights protected.

The bill does not charge that the tax sale to Platt was itself void for irregularity or any other cause, and no evidence has been taken on that subject.

The Court is not therefore at liberty to decide that question. It can direct, however, that Henry Douglass on being repaid by the complainants their proper proportion of the amount paid by him to obtain this title, shall make and deliver to complainants, to be placed on the land records of the District, his deed declaring the trust agreeably to the decree.

It is also deemed proper that the defendant should be allowed his just proportion as one of the tenants in common for whatever permanent improvements he may have placed upon the property whilst in his possession, as well as his costs and expenses in the purchase of the tax title from Platt, and that he be charged on the other hand with a fair amount for his use and occupation of the lots, and that each party pay his own costs in this suit.



CHRISTIAN WORCH  
vs.  
WILLIAM KELLY ET UX.

---

The joinder of husband and wife in an action where the husband is the sole debtor, is a fatal misjoinder of parties.

Law No. 3819, Decided January 31, 1893.

APPEAL from a judgment of the Circuit Court reversing a judgment of a justice of the peace which had been rendered in favor of plaintiff, and against the defendant and his wife.

The plaintiff had leased to the defendant a house and lot situate in the City of Washington. The latter becoming in arrear for the rent, suit was brought against him, his wife being joined as a defendant and judgment was rendered against both. The Court below reversed the judgment, and the plaintiff appealed to the General Term.

MR. FREDK. SCHMIDT for plaintiff:

The Court is empowered and directed by the statute to determine the case in a summary way upon the proofs and allegations of both parties according to law and equity and the right of the matter. The Court has power to dismiss the case as to the wife and give judgment against the husband.

MR. L. G. HINE, for defendant.

Joining the husband and wife in this suit was a fatal misjoinder.

MR. JUSTICE OLIN delivered the opinion of the Court:

From the foundation of the common law the joinder of two parties as joint debtors, when in fact one of them is not indebted is a fatal misjoinder. In this case the debt was solely that of the husband; consequently the joinder of the wife was fatal to the action.

The judgment of the Court below is affirmed.

THOMAS BROWN  
vs.  
CLEMENT BECKETT ET AL.

---

1. The earnings of the wife, and whatever has been purchased with it belong to the husband, and are liable for his debts.
2. The relation of husband and wife cannot exist between slaves, although they live together as such, and children are born of their union; nor can their continued cohabitation after emancipation raise, as in other cases, a presumption of marriage.
3. Defendant claimed under a deed of settlement made by one trustee to another, both of whom were strangers to her for her benefit the deed was not signed by her, but in it she was described as the wife of B.

*Held*, That she might claim under the deed without being estopped to deny that she was the wife of B.

4. In equity technical estoppels are not known, but proofs of that sort are considered as evidence to be received if competent, and considered only for what they are worth.
5. In civil, equally as in criminal cases, where the question at issue is the existence of a marriage, the affirmative must be made out by the party who asserts it.

Special Term. Equity. No. 583. Decided November 19, 1867.

BILL by a judgment creditor to set aside an alleged fraudulent conveyance.

THE CASE is stated in the opinion.

MR. R. P. JACKSON for complainant.

MR. C. M. MATHEWS for defendants.

MR. JUSTICE WYLLIE delivered the opinion of the Court.

This is a creditor's bill by complainant to obtain a decree to set aside a deed by which the legal estate in two lots of land situated in Georgetown, was vested in Joshua Riley in trust, for the use of Mary Beckett, the alleged wife of Clement Beckett, for her life, and after her death for her children, and for the sale of the said lots, on the ground

that said deed to Riley is fraudulent and void as against the creditors of Clement Beckett.

On the 10th of December, 1863, complainant obtained a judgment in this Court against Clement Beckett for \$552.96 with interest until paid, and \$35 costs, on a debt which had been incurred as long before as 1855.

Richard Cruit and A. B. Berry, other judgment creditors to the aggregate amount of about \$300, have also come in and proved their claims before the auditor.

The two lots in question were originally purchased in the name of Clement Beckett, and cost \$125, of which sum she paid \$50, and he \$75, and the deed was made to him.

Improvements were erected on the property, which greatly increased its value, but they were all paid for by her, from her own earnings; and there is strong evidence in the case that she not only clothed, fed and supported the children, but Clement himself, who was, and is, an inefficient and thriftless person.

On the 16th of November, 1854, Clement conveyed the lots to Hugh Caperton, Esq., in trust to secure a debt of \$1,500, which he owed to the firm of Wheatley & Morrison, of Baltimore. This debt, to its last dollar was paid by Mary Beckett from the proceeds of her own earnings, with which as she was able, she took up not less than twenty-two small notes, which Clement had given in evidence of the debt. All her small earnings were deposited by her with Mr. Orme, the agent of Wheatley & Morrison, and as these amounted to enough from time to time, she paid off the notes in their order, and we have them filed as proofs in the cause, showing how much may be accomplished by industry and frugality, even by a poor colored woman but recently emancipated from slavery.

The lots at this time, together with the improvements, were not worth anything like the amount of this debt. Having paid off the debt, however; a deed was made by

Mr. Caperton, conveying the lots to Joshua Riley in trust for Mary Beckett, wife of Clement Beckett, as she is there called, for her life, with remainder to her children in fee. This deed is also executed by Wheatley and by Morrison, the late creditors, and by Clement Beckett himself, but not by her; nor was it necessary it should have been executed by her, and it is dated 17th of May, 1859.

It is this deed which the bill in this cause charges to be fraudulent and void, as against Clement Beckett's creditors, and asks to have set aside, that they may have the property sold as his property.

Since the date of this deed she has made still further improvements upon the lots, consisting of two houses, proved to have cost from \$600 to \$800. Of this Clement paid not one cent. During the war she washed at the Seminary Hospital in Georgetown, and realized in this way from \$50 to \$100 a month. This is proved by the testimony of Mr. Cornell. She herself says, in her answer, that during the war she made in this way the handsome amount of \$4,000, with which she was enabled to pay for these improvements besides supporting her family, Clement Beckett included. Still we are bound to decide that however worthless the husband may be, all the earnings and the savings of the wife are his, and although with these she may have supported, fed and clothed him as well as herself and children, and bought property and built houses, they are his, and therefore liable for his debts; and if she has even paid off incumbrances upon the property to an amount exceeding its value, that will not save her, but the deed which proposes to secure it for her use, must be set aside as fraudulent and void as against creditors whose claims were in existence at the date of its execution.

That, to be sure, is a kind of fraud on which even a court of equity must look with allowance, whilst it is compelled to set aside the deed in obedience to a great public and gen-

eral policy, which, upon the whole, tends to the suppression of fraud.

But in the present instance we are relieved from the necessity of inflicting individual wrong, as the price exacted for the preservation of this general policy. Mary Beckett, as she is called in these proceedings, was not the wife of Clement, and her earnings and property are therefore her own.

The evidence in the cause shows us that as early as 1836 they were both slaves, owned by different masters in Georgetown. They came together and lived with each other as man and wife, and children were born to them. Yet they were not man and wife, for slavery was then the law of this District, and to that code the relation of husband and wife was a stranger.

On the 22d of August, 1838, Clement received emancipation from his master, Mr. Joshua Pierce, and on the 5th of June, 1844, Mary obtained her certificate of freedom from her master and friend, Mr. Jeremiah Orme. They continued to live together, after their emancipation, just as they had done before it. There is no evidence in the case that they were ever formally married. In such a case, as there was no possibility of marriage between them in their slavery, so their continued cohabitation afterwards can raise no presumption of that relation, as in other cases. The presumption, indeed, is quite otherwise. It is only a question of presumption in any case, and in this the presumption is met and rebutted by the facts which explain the nature of their relations to each other in the beginning, and which assumed no new character afterwards.

The marriage license record, kept in the office of the clerk of the Court, contains no evidence of any license ever having been taken out by these parties. The certificate made by the examiner by whom the evidence in this cause was taken down, does state that Mr. Jackson, the counsel

for the claimants, produced before him what purported to be an extract from the marriage license record, showing that, under date of 9th December, 1846, the record of a license to marry was issued to these parties. But I have had that record itself brought before me, and have myself carefully examined it, and have failed to find any such record under that, or under any other date. It is true that under date of the 8th of December, 1846, there is the record of a marriage license issued to "William Beckett and Caroline Slater (Blks.)," but that will not do for the case of Clement Beckett and Mary Slater. But complainants, for the purpose of creating, as they say, an estoppel against her on this point, have produced the deed of settlement already referred to, from Hugh Caperton to Joshua Pierce, in trust for Mary Beckett and her children, in which she is described as wife of Clement Beckett. But the deed was not signed or sealed by her, and is therefore not an admission of that fact on her part, although she claims the property under the deed. In equity technical estoppels are not known, but proofs of that sort are considered as evidence, to be received, if competent, and considered only for what they may be worth.

In the present instance the conveyance of the title was made by one trustee to another, who were both strangers to her, and for her benefit, because she had paid off the debt to Wheatley & Morrison with her own money. She is described in the deed as Mary Beckett, wife of Clement. It is not her acknowledgment, but only a *descriptio personæ*, used by the grantor, which, if erroneous, may easily be accounted for, but ought not to have any influence as an admission to her prejudice. Besides, we must consider that she was an illiterate colored woman, recently a slave, and likely to have but little knowledge on the doctrine of estoppels, and caring only to have the home secured for herself and children, which she had paid for so laboriously.

Five depositions, and five only, have been taken in this case, and they all prove that Mary Beckett, as she is called, borrowed money, and gave notes in her own name; kept a money account with Mr. Orme in her own name; purchased property in her own name; built houses and rented them out in her own name; and in general, and in all respects, held herself out, in matters of business, as an unmarried woman, and was so treated and practically regarded by the world.

Finally, we have the solemn answer of the parties under oath, that they never were married subsequently to the acquisition of their freedom. If their marriage, prior to that event was impossible under the laws of slavery, their relation to each other was only that of concubinage, and its character has not been changed since by any act of theirs.

Neither of them could maintain a suit for divorce from the other on account of any violation of the obligations of matrimony; and if either were now to marry, no indictment could be sustained for bigamy in such a case; not because merely that in such cases the law requires the marriage to be positively proved, but because in this case no marriage ever was contracted.

In civil, equally as in criminal cases, where the question for decision is the existence of a marriage, the affirmative must be made out by the party who asserts it. In both cases it is alike a question of evidence. *Consensus non concubitus facit nuptias*, and *concubitus* alone is often but slight evidence of a marriage, and may be met and overborne by other evidence, of which the present case furnishes a very strong illustration.

I speak not now of that class of cases in which, to prevent the commission of fraud, a court of equity will hold a party to his representations, although they may be false in fact. For example, a man who has represented to the world that a particular person is his wife, will be bound to answer

as husband for necessities furnished her as his wife, although she may not be such in fact. In such cases, however, it is not a question as to the fact of a marriage between the parties, but one of prevention of fraud attempted on the part of the ostensible husband.

The injustice threatened to be done to this poor woman and her children by seizing on the fruits of long years of her labor, economy and thrift, and applying them, a second time, to the payment of the debts of a thriftless husband, whom she has herself fed and clothed and sheltered, because he was the father of her children, may, fortunately, be averted without the violation of any of the established rules of the law.

*The bill is dismissed with costs.\**

---

\*No appeal was taken in this case to the General Term.



WILLIAM D. CASSIN  
vs.  
ROBERT L. BOZZLE ET AL.

---

A debtor commits no fraud upon his existing creditors by conveying to a trustee for the benefit of his wife such of his property as is by law exempt from execution.

Special Term in Equity No. 757. Decided February 25, 1868.

BILL in equity by a judgment creditor to set aside an alleged fraudulent conveyance.

THE FACTS are stated in the opinion.

MESSRS. BRADLEY & BRADLEY, for complainant.

MESSRS. M. THOMPSON and A. Lloyd, for defendant.

MR. JUSTICE OLIN delivered the opinion of the Court.

THE BILL in this case alleges in substance that the complainant was appointed receiver of Adler & Co., on the 5th of August, 1865, with authority to collect debts due the firm. That in June, 1866, he obtained judgment for Adler & Co. against the defendant Bozzle—that he has issued execution upon the judgment and that the marshal has returned the writ endorsed *nulla bona*.

That on the 7th of September, 1865, Bozzle the defendant executed to John B. Turton a deed of conveyance in consideration of love and affection for his wife Isabella his interest in certain household furniture, &c., to hold the same in trust for her.

That at the time of the execution of said deed of trust the defendant was indebted to Adler & Co., for which the receiver subsequently obtained his said judgment; that at the time of such conveyance Bozzle was in failing circum-

stances ; the bill charges combination between Turton and Mrs. Bozzle to defraud Adler & Co.

The deed of trust is made an exhibit by the complainant. From that it appears that all of the property conveyed is household furniture, and exempts all from sale upon execution unless the value of it exceeds the amount allowed by act of Congress to be exempt.

There is no averment in the bill that the furniture conveyed exceeded in value the amount allowed to be exempt. The answer sets up the exemption, denies fraud and combination in the conveyance and alleges the value of the furniture was not over \$300.

To this answer a general replication is filed. No proofs are taken and here the case ends.

Bozzle being a householder and the head of a family, could commit no fraud by transferring to a trustee for the benefit of his wife and children property exempt from execution, and this upon the facts of this case is all that he appears to have done.\*

*Decree dismissing the bill.*

---

\*No appeal was taken in this case to the General Term.

LEVI H. WHITNEY

vs.

JOHN B. FRISBIE.\*

- 
1. The act of Congress of March 24th, 1862, limited the claims of the purchasers under the Vallejo title to such portions of the Soscol Ranch as had been reduced to possession and settlement, in the usual acceptance of those terms, *provided that* no single improvement and settlement embraced more than one quarter-section of the tract in all cases where such claim interfered with existing established rights of pre-emption.
  2. The Soscol Ranch was open to actual settlement and pre-emption in October, 1862, under the pre-emption act of 1841, and a settler having made an actual settlement and complied with all the terms and conditions required by law to complete his title, or tendered performance thereof, is entitled to a patent; he has obtained such an interest and vested title and property therein as cannot be taken from him and transferred to another against his consent even by an act of Congress.
  3. Nor does the act of Congress of March 3d, 1863, interfere with such right, but rather protects the title of such a settler.
  4. Where one has wrongfully obtained from the government a patent for land to which a settler is already entitled under the pre-emption laws, he holds such title as a trustee for such settler and will be required to convey it to the equitable owner.
  5. Questions of trust are personal and not local, and are therefore subject to the jurisdiction of this Court, though the land in respect of which the trust has arisen is situated elsewhere.
  6. On an appeal to the Supreme Court of the United States any of the justices of this Court may on application to them fix the penalty of the appeal bond and determine as to the sufficiency of the sureties, and neither the statute or the rules of the Supreme Court provide for a re-hearing or a re-adjudication of the same matter, before any other justice of this Court.
  7. After a final decree in this Court and appeal taken according to the statute and the practice of the Court, this Court loses all further jurisdiction of the cause and the parties and can make no further order therein.
  8. Where the appeal bond is inadequate or the sureties are insufficient the remedy would seem to be an application to the Supreme Court to dismiss the appeal on either or both of those grounds.

---

Equity No. 734. Decided May 27th, 1863.

\*Reversed in part by the Supreme Court of the United States. See *Frisbie vs. Whitney*, 9 Wall., 187.

BILL to compel conveyance of certain lands in California. Certified to the General Term for hearing in the first instance.

THE FACTS are stated in the opinion.

MESSRS. BRADLEY & BRADLEY and MONTGOMERY BLAIR, for complainant.

MESSRS. DUNCAN S. WALKER and FRED. P. STANTON, for defendants.

MR. JUSTICE WYLIE delivered the opinion of the Court:

The quarter section of land in controversy is part of a large Mexican grant in California known as The Soscol Ranch.

Frisbie, the defendant, has obtained a patent from the United States for this quarter section; and the object of this suit is to compel him to convey his legal title to the complainant, on the ground that the latter had a prior valid equitable claim under the pre-emption act of 4th September, 1841.

In 1844, Micheltorena, Mexican Governor of California, assumed to make a grant of about 90,000 acres of land comprising the Soscol Ranch to one Col. Vallejo, for the sum of \$5,000 in money.

In 1855 Vallejo conveyed a large part of this tract, including the quarter section now in controversy to his son-in-law, the present defendant.

On the 24th March, 1862, the Vallejo title to all this tract of land was declared to be void by the Supreme Court of the United States.

On the 2d of June, 1862, Congress passed an act, declaring and making all lands belonging to the United States to which the Indian title has been or shall be extinguished, whether surveyed or not surveyed subject to settlement and pre-emption under the act of September, 1841.

The title of Vallejo to the Soscol Ranch being void, the

land belonged to the United States, and although not yet surveyed was by this act of June 2, 1862, ch. 94, opened to actual settlement and pre-emption.

In October, 1862, the complainant entered upon the quarter section in controversy in this cause, made an actual settlement and improvement, cultivated the land, has remained in possession to this day; and has complied or tendered himself ready to comply with all the other terms and conditions required by law to entitle him to a patent for the land.

Evidence was taken on this question before the register and receiver of the land office in California, who reported it to be sufficient to establish complainant's right, but they decided against him on the ground that in their opinion the land was not subject to pre-emption.

This decision, however, was reversed by the Commissioner of the Land Office, who held that the land was subject to actual settlement and pre-emption under the act of 1841.

From this decision of the Commissioner, defendant appealed to the Secretary of the Interior, who referred the question to the Attorney General, Mr. Speed, for his opinion on the subject.

The Attorney General thereupon furnished the Secretary with an opinion in accordance with which the latter reversed the decision of the Commissioner, and rejected the claims of all the settlers on the Soscol Ranch.

The following extract from that opinion contains the law on the subject as laid down by the Attorney General:

"That a settlor under the pre-emption laws acquires and can acquire no vested interest in the land he occupies by virtue simply of settlement; and that no vested interest is obtained until the settlor has taken *all* the legal steps necessary to perfect an entrance in the Land Office. Before such steps are taken, he has nothing but a contingent, personal privilege to become, without competition, the first

purchaser of the property which he may never exercise or which he may waive or abandon. During the interval between the institution of the settlement, and the establishment of the claim by proof and payment of the consideration nominated in the law, Congress has power to dispose of the land at its pleasure. It may recall the privilege previously conferred or invest any one else with the same privilege or it may make an absolute grant of the land to other parties with or without consideration."

The claims of settlers on the public lands even after having laid out their money, and expended their labor in making improvements and cultivation, no matter to what amount, or extent, and under the clear and solemn pledge of the Government, that they should thereby secure the absolute right of pre-emption being thus held, by the learned Attorney-General as of "no account," the Secretary of the Interior refused to recognize the claim of this complainant, as well as those of all the other settlers on this ranch, and directed patents to be issued to the claimants under the void title of Vallejo, in obedience as he supposed to the act of Congress about to be referred to.

At the instance of these Vallejo claimants Congress passed the act of 3d March, 1863, which the Attorney-General thought gave them a right superior to that of the actual settlers and improvers on the land, and it was under this act, and this construction of it, that patents have been issued in the claims of actual settlers, conceded to be as perfect as it is ever possible for such claims to be.

This act provides first for a survey to be made of the Socol Ranch as a portion of the public lands.

Second, that after the plats of survey had been returned to the District Land Office, "it shall, and may be lawful for individuals, *bona fide* purchasers from said Vallejo or his assigns to enter according to the lines of the public surveys at \$1.25 per acre, the land so purchased, to the extent to

which the same had been reduced to possession at the time of said adjudication of said Supreme Court."

Section fourth provides that all claims within the purview of the act should be presented to the register and receiver within twelve months after the return of the surveys, accompanied by proof of *bona fide* purchase under Vallejo, of settlement, and the extent to which the lands claimed had been reduced to possession at the time of the adjudication of the Supreme Court, and said register and receiver were to decide upon said claims, under such instructions as should be given them by the Commissioner of the Land Office, to whom the proof and adjudication were to be returned to the Local Land Office, and no adjudication should be final until confirmed by the Commissioner.

The second section of this act limits the privilege of purchase granted to the Vallejo claimants, to such parts of the ranch as they had "*reduced to possession at the time of the adjudication of said Supreme Court.*"

The fourth section, also, required proof to be made of "*bona fide purchase under Vallejo, of settlement, and the extent to which the lands claimed had been reduced to possession at the time of the adjudication of the Supreme Court.*"

On proof of *bona fide* purchase under Vallejo, these claimants were entitled to obtain patents on paying \$1.25 an acre for their land, to the extent that such lands had been reduced to possession at the time of the adjudication of the Supreme Court, namely 24th March, 1862, and they were entitled to no more. The fifth section provides, that all other portions of the ranch not embraced by these *bona fide* claims and settlement, should be "dealt with as other public lands."

The act in every section thereof treats the Vallejo title as void and the whole tract as public lands belonging to the government and intends to grant to the Vallejo claimants merely the "bounty" of pre-emption to the extent that

each of them had reduced his claim to possession at the date of the decision of the Supreme Court.

But the land in controversy in this case at the time of the decision of the Supreme Court referred to, had not been reduced to possession and settlement by this defendant nor by any one, in the usual sense of those terms when found in other acts of Congress relating to the public lands. It had neither been inclosed, cultivated, nor improved, otherwise than as it adjoined other portions of the ranch which had been so reduced to possession and settlement. We are of opinion that the fair construction of this act limited the claims of the purchasers under Vallejo, to such portions of the Soscol Ranch as had been reduced to possession and settlement, in the usual acceptation of those terms, and that no single improvement and settlement should embrace more than one quarter-section of the tract in all cases where such claim interfered with existing established rights of pre-emption. We think this is plainly the proper construction to be given to the second section of the act, which is in the following words: "That after the return of such approved plats to the District office, it may and shall be lawful for individuals, *bona fide* purchasers from said Vallejo, or his assigns, to enter, *according to the lines of the public surveys*, at one dollar and twenty-five cents per acre, the land so purchased *to the extent to which the same had been reduced to possession* at the time of said adjudication of said Supreme Court, joint entries being admissible by coterminous proprietors to such an extent as will enable them to adjust their respective boundaries."

The entries were to be made according to the lines of the public surveys, "*to the extent to which the same had been reduced to possession.*" The benefit of any one settlement and possession under this act, was to be restricted to the lines of the public surveys. One acre so settled and possessed would entitle the purchaser to some portion of the land, limited by the public surveys. What portion shall that be? It might



embrace many thousands of acres had the grant not been restricted by the condition that it should be confined to such portion as had been actually reduced to possession.

The defendant in this case thinks that the reduction of even a fraction of an acre on one corner of his void claim of thousands of acres entitles him to a pre-emption of the whole, in preference to the *bona fide*, vested, pre-emption rights obtained by actual settlers prior to the date of the act on which he builds his title, and at a time when the Vallejo claimants had no color of title, and not even an actual settlement. If the construction claimed by the defendant be correct (and it is the one on which the Department has acted in issuing his patent in this case), then it follows that any purchaser under Vallejo might claim sixty, eighty, or even ninety thousand acres of the land by showing the settlement and possession of a fraction of one acre on any portion of this vast territory.

We think the fair construction of the act in question is that which limits the claims of the Vallejo purchasers to such portions of the ranch as Congress, at the date of the act, had the right to grant consistently with the obligations of contract and good faith, which were due from it to the settlers.

Since the passage of the Act of 4th September, 1841, which introduced a new policy in regard to the public lands, the settler who goes upon a quarter section and makes his settlement and improvement acquires thereby an inchoate equitable title, which is as complete and perfect, to its extent, as title to any property can be.

Formerly settlers on the public lands were trespassers, but from time to time acts of Congress were passed allowing them the right of pre-emption on certain terms. To them these acts conferred bounty privilege, because the settlers having entered on the lands in violation of law, had no rights against the Government. And when we meet with an opinion of the Supreme Court which speaks of the rights

of the settlers to pre-emption, as a bounty, or gratuity on the part of the Government, we shall always find, that the Court is referring to cases under the acts in force prior to the passage of the act of 1841.

In the *United States vs. Fitzgerald*, 15 Peters, 407, it was held that no reservation or appropriation of the public lands can be made after a citizen has acquired the right of pre-emption.

In *Lytle vs. The State of Arkansas*, 9 Howard, 333, the Court say: "The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a substantive right; but when covered by the law it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it."

In *Delassus vs. The United States*, 9 Peters, 133, Chief Justice Marshal says that "no principle is better settled in this country than that an inchoate title to lands is property," and again he says: "The inquiry then is whether this concession was legally made by the proper authorities, and might have been perfected into a complete title." His inference was that the inchoate right which might have been perfected into a complete title, was "property."

In *Smith vs. the United States*, 10 Peters, 330, Mr. Justice Baldwin, in delivering the opinion of the Court, says: "It was never doubted by this Court that property of every description in Louisiana was protected by the law of nations, the terms of the treaty, and the act of Congress, and that in the term "property was comprehended every species of title, inchoate, or perfect, embracing those rights which lie in contract, those which are executory, as well as those which are executed." See also *Rice vs. Railroad Company*, 1 Black, 358.

The act of 1841 invites settlers to enter upon and make improvements on the public lands, and pledges the faith of the Government, that they shall have a patent for their

lands, for \$1.25 an acre. A settler makes his selection, moves his wife and children perhaps a thousand miles and settles on a quarter section of the public land, builds his cabin, and stable, clears away the forest, and at length, after years of united toil, hardship and exposures, on his part and that of his family, and the expenditure of hundreds of dollars in actual money in reliance on the promise of the Government embodied in a solemn act of Congress, that he should have his patent on paying \$1.25 an acre for the land, he is told by an Attorney-General of the United States, and a Secretary of the Interior, that he has no interest or title to his land—that "Congress has power to dispose of the land at its pleasure. It may recall the privilege previously conferred, or invest any one else with the same privilege, or it may make an absolute grant to other parties with or without consideration.

Such views as these are abhorrent not only to our sense of justice, but to every principle of law.

We are of opinion that at the date of complainant's entry on the land in controversy in October, 1862, it was open to actual settlement and pre-emption. That complainant having made his actual settlement and improvement on land, and complied with all the terms and conditions required by law to complete his title or tendered performance thereof, was entitled to have a patent for the land, and obtained such an interest and vested title and property therein, as could not be taken from him and transferred to another against his consent, even by an act of Congress.

That the act of Congress of March 3, 1863, under which the defendant professes to derive his title must be construed *in pari materia*, and in a sense consistent with the preservation of rights already fully vested and beyond the power of Congress to destroy rather than in a sense not given to the same language in other acts of Congress on the like subjects or in a sense repugnant to established principles of justice and law; and that so read and interpreted the act

itself protects the title of the complainant and silences the pretences of the defendant.

And that the defendant having wrongfully obtained from the Government a patent for the land in controversy, holds the legal title as a trustee for the complainant, and must be required to convey it to the equitable owner.

As the subject of this controversy is a question of trust, and therefore personal and not local, the jurisdiction of this Court is undoubted.

Nor are the proceedings between these parties now pending in a court in California any just obstacle to our jurisdiction, as the subject and the objects of that controversy are wholly different from these involved in the present suit.

NOTE.—The defendant having appealed to the Supreme Court of the United States from the decree rendered in accordance with the foregoing opinion and an appeal bond having been given. The plaintiff procured in Chambers a rule upon the defendant to show cause why the said bond should not be set aside for insufficiency, &c. The further facts necessary to an understanding of the case appear in the opinion of Mr. Justice Olin delivered upon the hearing of the rule.

MR. JUSTICE OLIN said:

A bill in equity was filed in this case, the object of which was after various amendments to procure a decree of this Court adjudging that a patent for certain lands granted by the general government to Frisbie was held in trust for Whitney, and that Frisbie be decreed to transfer the legal title to such lands to Whitney, and by the judgment of this Court a decree was entered in favor of the complainant as prayed in the bill. From that decree an appeal was prayed to the Supreme Court of the United States, and a bond was tendered and approved by the Chief Justice of this Court within the time limited by law, which made the

appeal operate as a supersedeas of the execution, or enforcement of the decree.

On the presentation of affidavits an order was made that the defendant Frisbie show cause why the appeal bond filed in the case should not be set aside for insufficiency in amount as well as for the alleged inability of the sureties named in the bond to respond to the amount of its penalty, viz., \$6,000.

Affidavits are produced tending to show that the bond is insufficient in amount to cover the rents and profits of the real estate of which the complainant by the decree of this Court is the adjudged owner during the probable pendency of the appeal to the Supreme Court, and also showing that the sureties in the bond are wholly irresponsible.

The bond is in due form and was approved by the Chief Justice of this Court. It is, however, stated in Whitney's affidavit on this motion that no proof was submitted to the Chief Justice of the sufficiency of either of the sureties or notice given to the complainant Whitney or his counsel of the application to file the bond.

I am of the opinion that the motion in this case should be denied for the following reasons:

1st. Either of the Justices of this Court might on application to him fix the penalty of the appeal bond and determine as to the sufficiency of the sureties, and neither the statute or the rules of the Supreme Court provide for a rehearing or a re-adjudication of the same matter before any other justice of this Court.

2d. That after a final decree in this Court and appeal taken according to the statute and the practice of the Court this Court lost all further jurisdiction of the cause and the parties and could make no further order in said cause.

3d. Whatever remedy the party may be entitled to in this matter, it would seem to be, on application to the Supreme Court to dismiss this appeal on the ground of this insufficiency of the sureties in the appeal bond or upon the ground of the inadequacy of the penalty of the bond. See *Castlet vs. Brown*, 9 Wheat., 553 Conklin's Treatise, Third Ed., 682.

H. SELLING, TRUSTEE,  
vs.  
OBEDIAH KIMMELL.

---

1. Where personal property is claimed to have been conveyed to a trustee and is afterwards levied on to satisfy a judgment against the grantor, replevin by the trustee is the proper remedy to try the title to the property.
2. A deed of trust of merchandise which professes to be made to secure a promissory note, but which permits the grantor to retain possession of the property and "to use and enjoy" the same until default be made in the payment of the note, is fraudulent and void as to creditors.
3. To constitute a valid deed of trust of personal property to secure a debt it must look alone to that object. If it contain provisions intended to enable the maker of it to secure the use and enjoyment of the property for himself and by means thereof plainly tends to defraud, hinder or delay other creditors, the deed is void and it is the duty of the Court to decide this question for itself and not to leave it to the jury.

Law No. 4098.\* Decided June 1, 1868.

MOTION for a new trial on exceptions taken in an action of replevin.

THE FACTS are fully stated in the opinion.

MR. J. B. ADAMS for plaintiff.

MR. A. G. RIDDLE for defendant.

MR. JUSTICE WYLIE delivered the opinion of the Court:

The amount of property involved in this controversy is very inconsiderable, but the principle is one of great interest and importance. On the 28th of February, 1867, one Elias Heidenheimer assigned to one Henry Selling (the

plaintiff in this cause) "all and singular the goods and chattels, wares and merchandise," named and described in the schedule, marked "A" and hereunto annexed, and lying and being situate in a certain messuage, or tenement and premises on Seventh Street, between L and M Streets, and No. 304 E street, between Twelfth and Thirteenth Streets west, in the City of Washington, and occupied by the said party of the first part *as a jewelry store*, in trust to one Eva Heidenheimer, to secure his promissory note held by her of even date with the deed of assignment, for the sum of \$2,000 with interest, payable five years after date; and in trust to suffer and permit the said party of the first part to retain possession of, *use and enjoy the said goods and chattels, wares and merchandise*, until default made in the payment of said promissory note, or until one quarter's rent of the premises containing said goods, &c., or other premises to which they might be removed, should become due and owing, and so remain due and owing for the space of ninety days, or should suffer any judgment to be recovered, and execution thereon issued and levied on said goods, chattels, &c., and in either of these events the trustee was to take possession of the property, make sale thereof at public auction, and after paying the expenses of the trust from the proceeds pay the debt due to Eve Heidenheimer, and then, if any thing be left, release to the party of the first part."

The property thus assigned consisted of three dozen clocks, two dozen silver watches, seven gold watches, one half dozen gold rings, five dozen plated rings, one lot of jewelry, one dozen spectacles, one dozen knives, one dozen pocket books, lot brushes, two show cases, twenty-four yards carpeting, three-fourth dozen chairs, one sofa and one bureau valued at \$2,000.

The defendant is a county constable, and levied on a small part of the property thus described to satisfy an execution in his hands, issued under a judgment in favor of one of

Heidenheimer's creditors. The trustee (Snelling) thereupon replevined the goods from the constable, which is the proper form of remedy under our law in such cases.

On the trial below the Court submitted the question of fraud in the deed of trust to the decision of the jury, who found in favor of the plaintiff, thus sustaining the deed.

The defendant excepted to this ruling of the Court, and has assigned for error; that the Court below ought to have told the jury that the deed was fraudulent in law upon its face. And we think the Court below ought so to have decided.

The goods in question were articles of merchandise described in the deed as "goods and chattels, wares and merchandise." They were in the store or shop of the grantor (Heidenheimer) exposed for sale. The deed expressly allowed Heidenheimer "to retain possession of, use and enjoy the same." Articles of this description could not be "used and enjoyed," except in their proceeds after sale. The deed then allowed Heidenheimer to make sale of the property and use and enjoy its proceeds during the whole period of five years until his note should fall due, unless in the mean time he should fall behind in paying his rent or some diligent creditor should obtain judgment, and issue and levy execution on the property, when the deed was to spring into life and defeat the claim of his landlord or other creditor. He might sell the property and make use of the proceeds for his own purpose as fully as though no deed of trust had been made, and yet the very creditors from whom it may have been purchased on credit were to be hindered and delayed, if not defrauded, of their claims by means of this contrivance, which was to fulfil the doubtful purpose of leaving the complete enjoyment and disposal of the property in the hands of the debtor, and seek to discharge it from the liabilities of property as in other cases.

Another objection fatal to this deed appears upon its



face. The property enjoyed was not capable of identification from any description in the deed or schedule. We have copied above the schedule at length, which shows on its face that not one of the articles enumerated could be removed in an action of replevin or detainer by the trustee if he were put to his action to recover the property.

For these reasons we think the deed of trust in this case is void on its face, and that the Court below erred in submitting that fact as a question for the consideration of the jury.

It is not our intention to express any opinion on questions not involved in the case before us.

Whether it be possible for a debtor to make a deed of trust assigning a stock of goods to secure a debt not payable, either principal or interest, till after five years, and in the meantime to retain the power to carry on business as formerly, is not likely to be a practical question much longer, in consequence of the passage of the bankrupt law. An absolute sale of personal property, even for a full and valuable consideration, is void in law, as against creditors and purchasers, unless the possession accompany the sale to the purchaser, and remain with him afterwards. But the owner of personal property may incumber his title to it with a mortgage or a deed of trust, and yet remain in possession if the deed be duly recorded. But he cannot do two things which are inconsistent one with the other. He cannot make a deed of trust which will leave him in possession and with the same powers to manage, "*use and enjoy*" the property as though it were his own. If the deed of trust confer these rights upon him, they are rights which belong only to an absolute owner, and property so held is responsible to his creditors, as though he held it absolutely and the deed is void on its face. To constitute a valid deed of trust of personal property to secure a debt, it must look

alone to that object. If it contain provisions intended to enable the maker of it to secure the use and enjoyment of the property for himself, and by means thereof plainly tends to defraud, hinder, or delay other creditors, the deed is void, and it is the duty of the Court to decide the question for itself and not to leave it to the uncertain arbitrament of a jury. "Fraud in fact," says Ch. Kent, "is reluctantly drawn by a jury, and their sympathies must be overcome by strong and positive proof before they will readily assent to the existence of a fraudulent intent, which is so difficult to ascertain, and, frequently, so painful to infer."

THE CORPORATION OF GEORGETOWN

*vs.*

JOHN B. DAVIDSON.

1. The ordinance of Georgetown of July 24, 1852, providing for the inspection of flour does not apply to such flour as is merely in transit through the city, as, for example, where it is shipped from a point in Maryland to the City of New York, and passes through Georgetown on its way to the point of destination.
2. If the ordinance were intended to apply to such cases it would be unconstitutional as an attempt to regulate commerce between the States.

At Law No. 4776. Decided November 2, 1888.

APPEAL from a judgment of a justice of the peace. Certified to the General Term for hearing in the first instance.

The plaintiff, Davidson, was the agent of the Washington and New York Steamship Company. In that capacity he received at Georgetown a quantity of flour consigned by certain parties in Washington County, Maryland, to certain parties in New York City, and shipped by canal to Georgetown, there to be transferred to the vessels of said New York Steamship Company to be transported to New York.

The flour so received by Davidson was consigned through to the consignees in New York, and was in Georgetown *in transitu* only and not for the purpose of use or sale in that place.

Whilst the flour was thus in Georgetown the corporation flour inspector demanded the right to inspect the same.

Davidson informed the inspector that the flour was consigned through to New York from Washington County, Md., and was in Georgetown *in transitu* only, and refused to allow him to inspect it.

Davidson then put the flour on board a vessel of the New York Steamship Company, to be shipped to the consignees, and it was transported to New York, and there delivered, according to the terms of the original consignment.

Thereupon a proceeding was instituted before a justice of the peace by the corporation of Georgetown against the plaintiff, and he was fined ten dollars for violating the ordinance of July 24, 1852.

The following are the sections of the ordinance under which the proceedings were instituted.

Sec. 7. And be it further ordained, that all and every barrel and half barrel of flour manufactured within this town, or brought to the same for *sale, shipment or exportation*, shall be subject to the examination of the inspector, by boring, searching, and trying it through with an instrument, not exceeding five-eighths of an inch in diameter, to be provided by the inspector for that purpose, who shall afterwards plug up the hole with a round plug made of soft wood, so as to prevent the entrance of water, and if the inspector shall judge the same to be merchantable, according to the directions of this ordinance, he shall at the time of inspecting, mark or brand on the head of every barrel or half barrel of flour, in letters one half an inch in length, the word "GEORGETOWN," together with a word or words designating the degree of fineness which he shall at the time of inspection determine said flour entitled to, with the exception of the degree *superfine*, which he shall mark or brand over the quarter, and the several degrees in quality shall be distinguished as follows, viz, family, superfine, fine, first and second middling, for the inspection of which the said inspector shall have and receive of the owner or agent for each and every barrel and half barrel one cent, and every barrel and half barrel of flour which shall prove on examination thereof to be unmerchantable, according to the true intent and meaning of this ordinance, the said inspector shall mark on the head with a broad arrow; and no barrel

or half barrel of flour not examined and branded or marked by the inspector as aforesaid, family, superfine, fine, first or second middlings, or marked with a broad arrow, shall be sold within this town, or shipped, or exported from the port of Georgetown, under a penalty of one dollar for every barrel or half barrel, to be paid by the person or persons so offending.

SEC. 14. And be it further ordained that if any seller, owner, agent, or other person shall prevent the inspector from exercising the duties enjoined on him by this ordinance, he or they shall forfeit and pay for every such offense • the sum of \$10.

SEC. 15. And be it further ordained, and it is hereby declared to be the true meaning of this ordinance, that every barrel and half barrel of flour manufactured within this town, as well as every barrel and half barrel of flour brought to the same, whether for sale, shipment or exportation shall be inspected by the inspector as aforesaid.

MR. R. T. MERRICK, for plaintiff:

I. The ordinance of Georgetown directing the inspection of flour which may be in said town *in transitu only*, and the imposition of a tax upon the owner or agent thereof, to pay for such inspection is unconstitutional and void. The passenger Cases, 7 How., 284; Gibbons vs. Ogden, 9 Wheat., 200; Brown vs. Maryland, 12 Wheat., 419, 443.

II. The ordinance cannot be defended as belonging to the class of *inspection laws*, recognized by the Supreme Court as within the legislative power of the several States. Such laws relate exclusively to articles manufactured within the State for exportation or domestic use or brought to the State for sale and use within its limits. Story, sec. 1017; Gibbons vs. Ogden, 9 Wheat., 203; Hancock vs. Sturgis, 13 John, 331.

III. The people of the United States constitute one nation, and have the right to go from one part of that nation

to another and engage in commerce between its various sections without thereby subjecting themselves or their property to taxation by the States or municipalities through which they may find it necessary to pass. Story, sec. 1066; *Crandall vs. The State of Nevada*, 6 Wallace, 43; *Steamship Company vs. Portwardens*, 6 Wallace, 31; *Federalist*, No. 42.

MR. C. M. MATTHEWS, for the corporation of Georgetown:

The law is perfectly constitutional. It is not a regulation of commerce within the meaning of the Constitution. It is a mere inspection law, designed to preserve the local character of Georgetown flour in foreign markets; and such laws have always been recognized by the Supreme Court as not interfering with the constitutional prerogative of Congress to regulate commerce.

But even if it is a regulation of commerce, Congress in granting a charter to Georgetown which authorized that municipality to provide for the inspection of flour, has given Georgetown the power to make such regulations of commerce as may be necessary to secure such inspection, by penalties or otherwise. The fact that the inspection laws and the inspection fees of Georgetown are the same upon persons residing outside, and upon residents of the city, shows that the only design of the law is to secure the purity of the article inspected, and thus that the law is merely such an inspection law as the Court has often decided to be constitutional.

MR. CHIEF JUSTICE CARTER delivered the opinion of the Court:

This case comes here on appeal from a judgment of a justice of the peace of Georgetown, to the Circuit Court, by which Court it has been certified to this Court for a hearing in the first instance. The appeal is from the decision of a magistrate of Georgetown inflicting a penalty of \$10 for the violation of a corporation ordinance.

(The ordinance, which is given in the foregoing statement of the case, was then read by the Court.)

The facts, as settled by the parties, are as follows, to wit: "The flour in question, which was claimed as the legal subject of inspection, was manufactured at Weverton, Md., by Geo. H. McClure & Co., and consigned to John J. Marvin, New York City.

"The flour was received by J. B. Davidson, as the agent of the New York and Washington Steamship Company, and forwarded by him on board the steamship Valley City to John J. Marvin, to whom it was consigned. It was taken, from the canal boat at the wharf of George Water's in Georgetown, D. C., and hauled from there in drays a distance of a little over one square to the wharf of said company, the said Davidson paying canal freight and drayage to their wharf and charging the same in the bill of lading from Georgetown to New York. While the flour was on the wharf of the steamship company, J. D. Robinson, the inspector of flour for Georgetown, D. C., demanded the right to inspect the same, and was notified by said Jno. B. Davidson that it belonged to J. H. Meixell, of Baltimore, and was to be carried over to New York as per bill of lading first referred to, and that he could not inspect the same. The flour was forwarded as per consignment above, without inspection. The said steamboat company is a common carrier from Georgetown to New York and intermediate points."

From this statement of the facts of the case it appears that the flour which is made the occasion of this controversy was owned by a citizen of Maryland, and by him manufactured in the mills of Maryland; that it was exported from its place of manufacture in Maryland under ultimate consignment to New York; that it pursued its transit from Washington County, Md., through the highways, and by the means chosen for its transportation, regularly and uninterruptedly until it reached its destination.

The first stage of its journey was in a canal boat upon the Chesapeake and Ohio Canal to Georgetown, then by drays over a brief carriage through Georgetown to the steamship, which continued its transportation down the Potomac River, Chesapeake Bay, and along the coast to New York City.

In the light of these facts it is claimed by the plaintiff that the shipment of the flour into and out of Georgetown brought it within the provisions of the ordinance providing for the inspection of flour within the city, making Davidson, who refused its inspection, answerable to the penalty of the ordinance. If the Court are to regard the ordinance in the literal signification of its language uncontrolled by its proper object and legal province, there would be an end to the inquiry, for the flour in controversy was literally shipped out of the city of Georgetown.

But is the term "shipment" entitled to a literal signification in connection with the subject under consideration? This question is to be answered under the light of the law and the facts. The City of Georgetown is a municipality of limited authority. In the enactment of the ordinance in question it exercised its municipal legislative power; and as we are compelled to infer, for municipal purposes. It legislated for the people, and within the jurisdiction of Georgetown. The subject of its legislation in this respect has been uniformly regarded by judicial authority as the subject of municipal power, limited to the territory of the municipality and the people within it, and never suffered to have extra-territorial effect. By all the authorities it is asserted that the purpose and latitude of inspection laws are to protect the citizens of a State or municipality in their credit as to the quality of the article which they may export, as the product of their own manufacture or production, or to protect the people of a State or municipality against imposition in the quality of what may be imported and con-



sumed by the people of the State or municipality. The right to interpose inspection laws is in no regard a right to regulate commerce, but a right which relates to the domestic economy and health of the people enacting it, and not strangers under a different government—a right which ceases when commerce removes the subject of inspection from the jurisdiction of the power imposing the inspection, a right which begins when commerce has terminated its office in delivering the subject of inspection up to the uses of the people imposing the inspection.

If we read this ordinance, therefore, in the light of its sphere of operation, the rational interpretation of the term "shipment" in it, is shipment of flour that in some form had been identified with the interest of Georgetown. The flour in question sustained no such relation to Georgetown or its inhabitants. The wheat from which it was made was probably grown in Maryland. It is admitted to have been manufactured and owned there and contracted to be sold in the City of New York. The only relation that Georgetown or its inhabitants sustained to it was the occupation of a few rods of ground across the highway of its transit, situated at the head of tidewater navigation and at the foot of the Chesapeake and Ohio Canal. The shipment in this instance, therefore, was in no sense a shipment from Georgetown, but a shipment through Georgetown, which begun in Maryland and terminated in New York City.

We are forced to these conclusions, notwithstanding the decision in the case of the Commonwealth vs. King *et al*, in the Supreme Court of Pennsylvania. That case, in its conclusion, is in conflict with these views; not in the consideration of the legal principles that should govern the question, but in the construction given to the act of breaking bulk and reshipping in the port of Philadelphia. The learned Court in the case referred to makes the act of re-shipment equivalent to an act of exportation, which would

seem to be sacrificing substance to shadow, subjecting the purpose and action of the parties to the manner and mode in which the purpose and act of the parties are executed. In fact, we are informed by this very case at its conclusion that the statute upon which the opinion was founded was so repugnant to the dictates of justice and the fraternity of the States that the Legislature repealed the act the day before the case went into judgment.

The Supreme Court of the State of New York in the case of *Hancock vs. Sturgess*, 13 Johns., 331, hold the contrary. In that case they decided that flour shipped under the same circumstances was to be esteemed *in transitu* and upon the highway. If the case stopped here the Court would be compelled to hold that the flour in question was not shipped from Georgetown within the legal signification of the term "ship" as provided in the ordinance. But, conceding that it was, it behooves the Court to inquire by what authority the City of Georgetown undertakes to legislate for the citizen of Maryland and New York.

As I have already had occasion to remark, the predicate of authority for the passage of inspection laws is that something is about to be exported from or consumed in the jurisdiction where they operate. The flour in question was shipped in Maryland by a citizen of Maryland to a citizen of New York. It had no destination in Georgetown, nor did its shipment contemplate any transfer to a citizen of Georgetown. The only office performed within Georgetown by any person of Georgetown was the office of a common carrier. The parties of Maryland and New York used the drays of Georgetown, and perhaps a citizen of Georgetown to transport the flour from the canal to the river under the unquestioned right to the use of the highway for that purpose. In the relations of this flour to Georgetown a toll gate would be a much more pertinent mode of taxation

than an inspection, if the authorities wished to levy taxation upon merchandise in transit.

By article first, section eight, of the Constitution, the power to regulate commerce among the several States, is given in express terms to Congress, and the States are expressly prohibited from laying duties on imports or exports in executing the inspection laws. This power, thus given to Congress, is essentially and necessarily an exclusive power, created, as we learn from the *Federalist*, in a paper contributed by James Madison, to cure the evils which experience had detected in the relation of the colonies under the articles of confederation—a power vested in Congress to avoid the obstructions to inter-state commerce so clearly exemplified in the case we have before us. To assume that this case is under the operation of the ordinance of the City of Georgetown, and that Georgetown had a right and authority to create the ordinance, would be to assume that the power vested by the Constitution in Congress resides in the City of Georgetown, with the right to regulate the commercial relations of Maryland and New York, for the effect of the ordinance is to say that they shall not trade with each other in flour, through the Chesapeake and Ohio Canal and the Potomac River, except upon the condition of permitting the levy of an inspection duty.

If any one proposition was better settled than any other by the people of the United States in the adoption of their constitution, which transformed their relations from a confederated into a national character, it is the proposition that the commercial intercourse between the States and all the States should be free, and delivered up to the exclusive regulation of the Federal legislative power, thus placing the right of inter-State commerce beyond the reach of interruption or imposition on the part of any interposing State, and making each and every State of the union contiguous, however re-

note from each other they might be in their geographical positions.

We do not, therefore, think the ordinance capable of the construction claimed for it by the plaintiff; but if it is capable of that construction, we are still constrained to the opinion that it is inoperative and void, not only by the irresistible logic that brings us to that result, but by the spirit of the decisions of the Supreme Court in all the cases involving the question of the commercial relations of the States, and the rights in that regard of the citizens of the United States from the case of *Gibbons vs. Ogden*, 9 Wheat., 203, to the case of *Crandall vs. The State of Nevada*, 6 Wall., 43.

*Judgment reversed.*

WILLIAM HERFURTH  
*vs.*  
THE CORPORATION OF WASHINGTON.

---

1. A municipality is only liable for the negligence of a licensee under its authority when it has notice of such negligence.
2. Whether exemplary damages can be recovered against a municipality for the negligence of its licensee *quare*. The case at bar held on the facts to be, at all events, not one for exemplary damages.

Law. No. 1926. Decided June 3, 1893.

MOTION for a new trial on exceptions.

THE ACTION was brought to recover damages for injuries resulting to the plaintiff by being thrown from his buggy and breaking his arm in consequence of running into an open sewer ditch on Sixth Street near D Street northwest in the City of Washington. The evidence showed that lamps had been placed around the ditch and that they had been lighted, but there was no proof that they were burning at the time the accident occurred.

THE COURT\* gave the following charge to the jury:

It is made the duty of the corporation by the law of its charter, to see to it that all its streets are kept free of nuisances, and that nothing being allowed to remain there, for even an hour, which is dangerous to the lives or safety of the public. This is the general rule as to its responsibility.

If a nuisance have been placed in one of the public streets by a private individual without the previous consent or knowledge of the corporation and an injury is thereby caused, the corporation is not liable for the damage, unless

---

\*Mr. Justice Wylie presiding.

the nuisance had continued sufficiently long to become known to its officers or actual notice been given to them of its existence.

But, on the other hand, if the nuisance have been placed or erected in the streets in pursuance of a license or permission granted for that purpose by the corporation, its responsibility for the structure commences from that instant as though it was its own work.

The necessities of society under certain circumstances will justify what might otherwise be a nuisance. Fuel may be placed in the street until it can be removed to its owner's premises; building materials may be left there till they can be used; and excavations for water, gas, or sewer pipes may be made in the streets.

But all these encroachments must be reasonable both as to their extent and duration, must be guarded and so protected as to secure the passers from danger; and if they be not so guarded and protected they remain plain nuisances, and if damage results in consequence the corporation is responsible if it have had notice of their existence. Every possible precaution against danger is required of the corporation in such cases; and the streets must at all times be kept as safe for the public as they would be if such obstructions were absent.

This constitutes the broad and plain path of duty for the corporation, which, if faithfully followed, will prove its sure protection under all circumstances and has been already laid down by the Supreme Court of U. S. in *Chicago vs. Robbins*, 2 Bl., 418.

But this rule as to the duty of the corporation is not to be interpreted, so as to confer a license on any one who chooses so to ventilate his independence to run amuck against any thing he may find in his way, in defiance of the dictates of common sense, and violation of the voice of prudence and of reason, and if he have thus plunged himself into a ditch or upon some barrier, and broken his arms

or legs, to demand of the corporation damages for the self inflicted injury.

There are, doubtless, to be found encroached upon the public streets of this city a number of substantial fences, and other permanent structures which are legal nuisances, and for whose continuance the city is responsible. But would any one pretend that the city should be held liable in damages to the man who wilfully or through his own clear negligence, had run his horses and carriage on such obstructions?

The principle of law is the same in regard to excavations in the streets. Although it be a neglect of duty on the part of the city, if they be not so guarded as to leave the street just as secure after they have been made as it was before, yet if any one will drive his horses without looking where he is going, or so furiously as to violate the law in that respect, and lose the control of them, and injury happen to him in consequence, he must himself bear the loss.

In the case of *Davies vs. Mann*, 10 Mees. and W. 546, the plaintiff was the owner of an ass which he had fettered and hitched in the public highway, so that it could not get out of the way. The defendant negligently drove his horses and wagon against and killed the ass. It was held that the plaintiff was entitled to recover for the loss of his animal, notwithstanding his own illegal act, in so putting him in the public highway.

In *Riddle vs. Proprietors of Locks, &c.*, 7 Mass. R., 169, it was held that although it was the duty of the defendants, imposed on them by law, to make and keep the canal and its locks in good navigable repair, they were not liable for damages to the plaintiff, unless he had himself acted with reasonable discretion and prudence.

In *Butterfield vs. Forrester*, 11 East. R., 60, Ld. Ellenborough, Ch. J., states the general rule with perfect precision, as follows: "One person being in fault will not dispense with another using ordinary care for himself.

Two things must concur to support this action—an obstruction in the road by the default of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

On the other hand, it is my duty to instruct you that "if the defendant be guilty of a degree of negligence, from which the plaintiff, with the exercise of ordinary care, cannot escape, he may recover, although there was want of prudence on his part;" and applying this rule to the case before you, if you find from the evidence that the excavation on Sixth Street, at which this plaintiff received his injuries, was of such a character and so situated, and so left unprotected, that the plaintiff could not have escaped it on that occasion by the use of ordinary care, he is, nevertheless, entitled to recover, notwithstanding there may have been a want of prudence on his part.

After having applied these principles and rules of law to the facts in the case, as you shall find them, should you come to the conclusion that the plaintiff is entitled to recover, the next question will be as to the amount of damages you will give.

On this subject the Court is constrained to say to you that there seems to be no exact and well defined rules to govern your discretion. You are, nevertheless, to consider the actual loss to the plaintiff, both past, present, and prospective, sustained in consequence of his injuries, and this is the very lowest amount you would be justified in giving. You are to consider the injury to his health, the use of his limbs, his ability to labor and attend to his affairs, and generally to pursue the course of life he might otherwise have pursued; and also the bodily pain and suffering which they have produced. But all these should be the legal, direct, and necessary results of the injury and not fanciful or conjectural.

And although the facts of this case are such that you ought not to render a verdict for punitive or vindictive damages, yet the Court is not prepared to say that you are



to shut your eyes to the public example which may be set by your verdict.

The mental suffering which sometimes results from injuries of this kind ought not to enter into your consideration. That element is too uncertain to be taken into account in making up a verdict for dollars and cents. Worlds would not compensate to a person of high intellectual and nervous organization for the mental anguish resulting from a limb fracture by a headlong plunge into a ditch in a public highway in the darkness of night and the subsequent physical anguish. There are others of a grosser nature composing, probably, much the more numerous class, whose sensibilities are more callous, and to whom physical pain is the only suffering, and even as to that they are comparatively indifferent. The prize-fighter whose highest ambition is to imitate the example of the bull-dog (which is indeed his superior in all those points in which he most prides himself) and risks his life and limbs for money, would hardly receive justice at the hands of a jury if the amount of his damages were to depend upon proof of the refinement and susceptibility of his nervous organization.

A verdict of \$1,500 was rendered for plaintiff.

MESSRS. BRENT and MERRICK, for plaintiff:

The charge of the Court as to the responsibility of the corporation for accidents occurring by reason of the improper condition of the public streets, is fully sustained by the cases of *Storrs vs. City of Utica*, 17 N. Y., (3 Smith,) 104; *Chicago vs. Robbins*, 2 Blk., 418. -

As to the amount of prudence used by plaintiff, where he could not avoid the accident by the exercise of ordinary care. *The Propeller Genessee Chief vs. Fitzhugh*, 12 How., 461; 3 Man. and Ry., 105.

The remarks of the justice, as to the damages, were fully warranted by the evidence.

MR. JOSEPH H. BRADLEY, JR., for defendant.

MR. CHIEF JUSTICE CARTTER delivered the opinion of the Court.

The corporation of Washington is only responsible for the negligence of a licensee under its authority when charged with notice of his default. The City is not an insurer in any event of the safety of the citizen passing along the public highway. This case stands precisely as it would if a private individual had made a nuisance of the highway of which the corporation had no notice. We do not think that the case is one for exemplary damages.

MR. JUSTICE OLIN said:

The whole doctrine of exemplary damages as applied to an agent has no solid foundation. Such a case as this is not a case for exemplary damages. The corporation of Washington is an agent of the people. The people are bound for their negligence, but they are not insurers of every wayfarer on the streets.

MR. JUSTICE FISHER said:

There must be carelessness on the part of the corporation proved. In a case where there were lights placed by the corporation and afterwards extinguished by the wantonness or malice of boys, or drunken parties at a late hour, the city cannot be made responsible for a resulting injury. As to exemplary damages, there is no difference between them and punitive damages. They are identical and can be given only in the same cases.

Judgment reversed and a new trial granted.

SCHUEHARDT ET AL.

*vs.*

JOSEPH THORNTON.

---

The measure of damages, where a bill of exchange is returned protested for non-payment, is its value at the place and time of payment.

Law, No. 2,815. Decided June 10, 1868.

MOTION for a new trial on exceptions.

ACTION against the defendant, as drawer of a bill of exchange for 2,500 pounds on Benjamin Thornton, London. The bill was purchased by the plaintiffs for \$11,600 in gold, was accepted by the drawee and, at maturity, was protested for non-payment.

The current rate of exchange, both in currency and gold was proved at the trial, and the plaintiffs asked the Court to instruct the jury that they were entitled to recover according to the exchange in currency, and the 15 per cent. damages on the value of the bill in currency; but the Court, on the contrary, ruled that the amounts were to be computed in gold. This was the subject of the plaintiff's exception.

MR. WALTER S. COX, for plaintiff:

The Act of Assembly of Maryland, of 1785, Ch. 38, Sec 1, gives the right to recover, in suits on foreign bills, so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, *at the current exchange of such bills, and also 15 per cent. damages on*

*the value of the principal sum mentioned in such bill, with costs, interests, &c.*

Bills of exchange are an article of commercial dealing. They are bought and sold. The act of Assembly treats them as a subject of purchase, and regulates the damages by their cost in the market. When we speak of the value of anything, we speak with reference to the cheaper currency. We say an article is so much higher, because of the currency.

The verdict should be for such amount as would have to be paid in currency, because the payment is to be made in currency. If the verdict be for the amount which would make good the claim in gold, and yet the defendant may pay that amount in currency, the plaintiffs do not get back their principal.

This is not a debt, within the legal tender act, for so many dollars. It is a special contract, that a third person will pay so much specie in London, where greenbacks are not money, and the plaintiffs sue for damages, for breach of this special contract. Under the general law merchant, they would be entitled to re-draw from London, for so much as would make good to them there, at the maturity of the bill, the amount thereof; or, in other words, to recover such amount here. And as they can only recover currency, it follows that the exchange, &c., must have been computed in currency, or they would not be indemnified. The act of Assembly substitutes a full indemnity for breach of a special contract to be performed abroad.

MESSRS. KENNEDY & WEBB for defendant.

MR. CHIEF JUSTICE CARTER delivered the opinion of the Court:

The bill must be held at its value in London at the time it was presented. Where parties contract with each other on a gold standard, and with a view to the price of gold, they should be held to respond in gold. No principle of

the law merchant is better settled than that a bill of exchange shall be paid at its value at the place of payment. To say that when this bill, which was drawn with a view to its payment in gold, came back to this country it might be paid in a currency worth forty per cent. less than gold would be to set aside the contract of the parties.

MR. JUSTICE OLIN said:

This bill of exchange was an article of merchandise, and certainly it could not be bought at \$4.44 per pound sterling. The error below was in regarding this as a mere money transaction, when in fact it was the purchase of a merchantable article.

Verdict and judgment set aside and new trial granted.

MR. JUSTICE WYLIE dissented.

L. D. HARMON ET AL.

vs.

ALEXANDER MOFFITT.

- 
1. In an action against the indorser of a dishonored promissory note a new trial will not be granted because the plaintiff did not offer the note in evidence to the jury when it appears that the note was attached to the declaration, and that on the cross-examination of the defendant's witnesses the note was produced and proved.
  2. An indorser who is a party to the original contract for which the indorsed note is given is liable thereon if after its dishonor he promised to pay the same, even though no actual demand on the maker or notice of dishonor be proven on the trial.

Law No. 3153. Decided October 20, 1888.

MOTION for a new trial on a bill of exceptions.

THE FACTS are sufficiently stated in the opinion.

MR. T. J. D. FULLER, for plaintiff:

The evidence of the contract for the sale of lumber, and of the giving a note in payment therefor, which the defendant below admitted by his demurrer to the evidence, was evidence on which no judge would have been justified in directing the jury to find for the defendant.

The plaintiffs have declared against the defendant as endorser, and sue also upon the common counts. The sale of lumber was to Howe and Moffitt jointly; the credit was given to them jointly, and it was to be paid for by their note on time. The form of the note is a matter of no moment.

Upon the second branch of the case the law is clear and well settled that an unconditional promise by an indorser to pay the note dispenses with the necessity of proof of a demand upon the maker and notice to himself. It is said that the promise must be made with knowledge of the laches of the holder. This latter question was one of pure fact, and it was for a jury to determine it.

MR. SAM'L. PHILLIPS for the defendant:

The defendant was only liable as indorser. The statement of the evidence shows this was the intention, and his indorsement of the note was the contract carrying out this intention.

Knowledge by indorser of the laches of the plaintiff in not making demand and giving notice, is necessary before waiver of the laches can be presumed. A mere unconditional promise to pay is not evidence of knowledge. *Thornton vs. Wynn*, 12 Wheaton, 183.

When plaintiff closed his case there was no evidence of the date of the note, of the manner of indorsement, the amount, where and how, or when it was payable; nothing to show that the allegation of the declaration were supported by the proof, and therefore the justice erred in not sustaining the demurrer to the evidence.

MR. JUSTICE WYLIE delivered the opinion of the Court:

The plaintiffs were partners, and claim that they sold to the defendant and one P. House, who bought the same jointly, a bill of lumber amounting to \$1,445.79, for which they gave the promissory note of the said House, indorsed by Moffitt at four months. The note was dated the 10th of April, 1865, and was made "payable at any bank in Washington, D. C." It fell due on the 13th of August, when demand of payment was made at the First National Bank and two banking houses in said city, which was refused and notice thereof being sent by mail to the maker and indorser, directed to the cashier of the First National Bank of Alexandria, through whom it had been doubtless sent for collection, and whose name as cashier was also on the back of the note.

The declaration contains a count on defendant's indorsement, and avers due demand made on the maker for payment, and notice of non-payment given to the defendant and the note and protest are attached to the declaration.

It also contains a count for goods sold and delivered to the amount of the note.

Defendant pleaded: 1st. That he never was indebted as alleged. 2d. That he did not promise as alleged. 3d. A failure of the consideration of said note, and that \$622.80 was all that was due. 4th. Defendant claimed to recoup \$500 expended in transporting the lumber, the sale and delivery of said lumber being the consideration of the note.

On the trial, the plaintiffs gave evidence tending to show that they sold the lumber to House and Moffitt jointly, and that credit was given to them jointly, and that they received the promissory note in question in payment of said bill; that after the note had become due the defendant promised to pay it, but subsequently refused to do so, and thereupon closed his case. Thereupon defendants asked the Court to instruct the jury that the verdict must be for the defendant on the ground that neither the promissory note sued on nor proof of demand and notice had been given to the jury, but the Court refused to so instruct the jury, to which refusal the defendant thereupon excepted. A verdict was then rendered for the plaintiff.

We think the Court below was right in refusing to grant this instruction. The note and protest were attached to the declaration filed in the case, and it further appears that on the cross-examination of the defendant's witnesses, the note in question was produced and proved. As to the objection that there was no proof of demand on the maker, and notice of non-payment to the indorser, the promise to pay by the defendant was *prima facie* evidence that the note had been properly presented, dishonored, and due notice given the indorser. Lord Ellenborough decided this in 7th East, 231. This doctrine is entirely consonant with Thornton vs. Wynn, 12 Wheaton, 183.

MR. CHIEF JUSTICE CARTER, concurring, said:

I base my judgment on the fact that this indorser was



one of the vendees of this property. This is a proved and admitted fact in the case. There is nothing in the case to show that the relations of the parties to the transaction were any other than relations of convenience; nothing to show that the position of the parties was altered by the mere taking of a promissory note. In the view I take of the case, the indorser was really one of the makers of the note. When the plaintiffs sold this lumber they sold it to be paid for, and they never have been paid for it. The fact that one of the purchasers put himself in the position of maker and the other indorser does not alter their relations. This view of the matter sheds light on the questions of want of demand and notice and the effect of the promise to pay. It is said that this was a naked promise, but I think not. The purchase of the lumber was its consideration, and as the indorser was an original purchaser his promise was good, whether or not a demand had been made on his co-partner or not.

Mr. JUSTICE OLIN, dissenting, said:

I think it pretty well settled law that, if the defendant be sued as indorser he can not be sued in any other capacity—as an original party or otherwise. The note given concluded the contract of sale, and was evidence of its character. I do not concur that a promise of the indorser to pay the note after maturity, is even *prima facie* evidence of the waiver of the indorser's right to take notice of the maker's default, unless the indorser was aware that he was discharged of his obligation to pay at the time he made the promise; such promise was void, as made under a misapprehension of facts, and certainly could not be made the foundation of an action on a promissory note.

Judgment affirmed.

EDWIN H. DAWSON ET AL.

vs.

CLEMENT WOODWARD.

---

This Court possesses jurisdiction concurrently with justices of the peace where the amount in controversy lies between fifty and one hundred dollars.

Law No. 5040. Decided October 23, 1868.

CERTIFIED to the General Term for hearing in the first instance.

Plaintiff Dawson brought his action in assumpsit in the Circuit Court for the sum of \$80. Defendant pleaded that the Court had no jurisdiction, because Congress in conferring upon justices of the peace jurisdiction of cases involving amounts as high as \$100, by implication withdrew the original jurisdiction of the Circuit Court over sums below that amount. Plaintiff demurred to the plea, and the demurrer being certified to the General Term, the Court sustained the demurrer, holding that where the amount in controversy was between fifty and one hundred dollars this Court possessed jurisdiction concurrently with justices of the peace.

MR. WM. A. MELOY, for plaintiff.

MESSRS. JONES and ASHFORD, for defendant.

MARY REDWOOD  
vs.  
THE METROPOLITAN RAILROAD COMPANY.

---

A principal is not liable in exemplary damages for the tort of his agent, unless he is derelict in connection with the offense of the agent.

LAW. No. 3451. Decided October 30, 1888.

ACTION against a street railway company to recover damages for injuries received in being thrown by the conductor from a street car in motion, verdict for plaintiff and motion for a new trial on exceptions. The only question in the case was whether the Court below erred in overruling a prayer of the defendant that the plaintiff was not entitled to recover exemplary damages.

MR. JOS. H. BRADLEY, for plaintiff.

MR. N. WILSON, for defendant.

I. The Court below erred in its instruction as to the measure of damages in this case.

Conceding that punitive or vindictive damages may be given in a civil action when there has been gross negligence or willful injury, the rule is confined to those cases in which the malice, willfulness, or gross negligence of the *actual defendant* occasioned the injury. The doctrine of vindictive damages is utterly indefensible, except upon the theory that it affords a means of punishing *wicked intentions*. In cases where the actual defendant is incapable of forming an intent, or has done no act indicative of an intent, the reason of the rule ceases to exist, and with the reason the rule disappears.

Therefore, in actions for trespass against a railroad corporation for the trespass of one of its servants punitive or vindictive damages cannot be recovered unless it is shown that the company expressly or impliedly participated in the tortious act, by authorizing it before or approving it after it was committed. *Hagan vs. Providence and Worcester R. R. Co.*, 3 R. I., 88; *Wardrobe vs. Cal. Stage Co.*, 7 Cal., 118. *Wall vs. Mayor N. Y.*, 2 Hill, 240; *Milwaukee and Mississippi R. R. Co. vs. Finney*, (10 Wis., 388); *Hill vs. N. O. and O. and G. R. R.*, (11 La. An. Reps., 292); *McGuin vs. Golden Gate*, 1 McA., 104; *Hill vs. Chamberlain*, 3 Wheaton, 546.

II. The Court below erred in rejecting evidence of the instructions issued by the company to its employees. The question presented to the jury was as to the negligence and gross negligence of the defendant. The object was to reduce damages by showing the care exercised by the defendants; for this purpose the evidence was clearly admissible. *Am. Railway Cases*, vol. 2, p. 162.

MR. CHIEF JUSTICE CARTER delivered the opinion of the Court:

We think that the Court below erred in overruling the instruction prayed by the defendants, to the effect that the plaintiff was not entitled to vindictive or exemplary damages, but only to compensation for whatever loss, pain or injury the defendant might have sustained.

In this case it does not appear but that the defendant used all necessary diligence to secure the safety of the passengers on the road. The law will not allow exemplary damages to be inflicted on a principal for the act of his agent, unless it be shown that the principal was derelict in connection with the offense of the agent. Nothing of the kind was shown here, and a new trial must, therefore, be granted.

## THE UNITED STATES

*vs.*

HUYCK.

---

An appeal does not lie to this Court from an order of the Criminal Court overruling a motion to quash an indictment. Such an order is interlocutory only.

Criminal Docket No. 4881. Decided November 4, 1888.

## STATEMENT OF THE CASE AND DECISION.

INDICTMENT for grand larceny. The defendant challenged the array of grand jurors and moved to quash the indictment. The motion was overruled, whereupon an appeal was taken to this Court.

When the argument of the case was begun, Mr. Justice Olin said as the case came to the General Term, not on a final judgment or decree, but upon exceptions to the ruling of the Court below upon an interlocutory question as to the constitution of the grand jury, he was doubtful whether the case was properly before the Court. Whereupon all the justices concurred that the order in question was merely interlocutory, and was unappealable.

MR. JUSTICE WYLIE also said:

The act of 1863 organizing the Supreme Court provides means of appeal from the Circuit Court and from the Special Term to the General Term, but is silent as to appeals from the District Court or the Criminal Court. The act of 1838 must, therefore, be resorted to in order to ascertain the method by which appeals from those courts may be

taken. It appears by that act that the old Circuit Court was the appellate Court to the Criminal and the District Courts, and that to the Supreme Court of the District of Columbia was transferred all the jurisdiction of the old Circuit Court. Hence, appeals from the Criminal Court must come here under the act of 1838, and not under that of 1863. The act of 1838 furnishes the rule governing such appeals, and that act provided that the Circuit Court should have power to award a writ of error in any criminal case whatever, wherein final judgment had been pronounced by the Criminal Court convicting any person of any crime or misdemeanor. The rule of this Court allows appeals to be taken wherever a writ of error will lie, but in all other respects the act of 1838 is the law of this case.

Appeal dismissed.

MESSRS. E. C. CARRINGTON and N. WILSON for the United States.

MESSRS. W. D. DAVIDGE and A. G. RIDDLE, for the defendant.

## THE UNITED STATES

*vs.*

JOHN H. SURRETT.

The Government has no right in a criminal case to an appeal or writ of error when judgment has been rendered in favor of the prisoner.

Criminal Docket. No. 5920. Decided November 6, 1868.

MOTION to dismiss an appeal brought by the United States from a judgment of the Criminal Court quashing an indictment and discharging the prisoner.

THE FACTS are fully stated in the opinion.

MESSRS. E. C. CARRINGTON, N. WILSON and EDW. PIERRE-PONT, for the United States.

MESSRS. JOS. H. BRADLEY and R. T. MERRICK, for the defendant.

MR. JUSTICE OLIN delivered the opinion of the Court:

In the case of the United States *vs.* John H. Surratt, which comes here on an appeal by the United States from the judgment of the Criminal Court, a motion has been made by the defendant to dismiss the appeal.

The accused was indicted under the second section of the act of July, 1862, for engaging in the rebellion, by conspiring to abduct or murder the President of the United States on or about the 6th day of March, 1865. The indictment was found on the 18th of June, 1868. The accused was arraigned, and in the first instance pleaded "not guilty," but was subsequently allowed to withdraw that plea when he interposed the special plea of a pardon growing out of the

President's proclamation of amnesty, as he claimed. To that plea a demurrer was entered on the part of the United States. Upon the argument upon that demurrer the Court in its ruling thereupon, it seems, went back to the indictment, when discovering what it regarded as a defect therein, gave judgment for the prisoner.

The defect relied on in the indictment, if it be a defect, arose under the statute of limitations, which required an indictment of this description to be found within two years after the commission of the offense. It appears on the face of the indictment that it was found after that period. That question arose, and the judge decided the indictment was invalid because of this alleged defect, and accordingly discharged the prisoner. An appeal was taken from that ruling to this Court, and a motion has been made and argued to dismiss that appeal. The only question, therefore, before us for decision is whether the district attorney can bring a writ of error or appeal to this Court when the ruling of the Court below has been in favor of the prisoner, and the prisoner has been discharged in consequence of such ruling.

After a somewhat protracted argument upon this subject, and a careful examination by the Court of the authorities cited, we have concluded to follow the authority of *The People against Richard S. Corning*, in 2d Comstock, p. 1, where it was held after a thorough review of all the cases that a writ of error will not lie in behalf of the people after judgment for the defendant in a criminal case.

Hence it becomes unnecessary for us to consider whether the judge below erred or ruled correctly on the demurrer, and on the question arising under the indictment. We think that, in the absence of any statute, the United States cannot bring up by writ of error or appeal a cause where final judgment has been given. We have debated, in this and other similar cases, what is the practice and what are the relations between this Court in



banc and the Criminal Court. I will now take occasion, I hope with the assent of my brethen, to announce two or three simple propositions, which, I think, will enable the bar to avoid being misled in regard to this matter. We early decided that in hearing all cases which should come before us in banc by way of review from either of the several Courts which are named in the statutes, and which one judge is assigned to hold, that no writ of error was required to bring the case before us, but that it might be done by way of appeal. If the organic law did not authorize a writ of error, it did not prohibit it, but rather looked to an appeal, conferring upon us the right of establishing all rules of practice. We regarded it as simply a question of practice whether a case should come from the Circuit Court here, or from the Equity Court, by writ of error or by appeal, and the simplest and most expeditious mode we thought to be an appeal.

Now, with reference to the Criminal Court, I think we concur that no appeal lies on the part of the prisoner from the Criminal Court, except in those cases where a writ of error would have laid to the old Circuit Court from the Criminal Court. In place of a writ of error we have substituted an appeal, which brings up the records, brings up the bill of exceptions, brings up everything necessary to determine the case, and is a much more expeditious and easier mode of practice than suing out a writ of error.

There is a further rule of practice that may be averted to in this connection; that is, the practice that heretofore existed by the judge of the Criminal Court certifying to this Court in banc a question of law. That practice may still exist, as we understand it, under the rules of the Court and under the statutes. No questions, then, would come to this Court from the Criminal Court, except on bills of exceptions by the defendant, or unless the question was certified up to this Court by the judge holding the Criminal Court. In those two cases the

question would come here, but we all agree that the people have neither the right to a bill of exceptions nor by consequence to an appeal, because an appeal only takes the place of a bill of exceptions. For the reasons I have stated the appeal is dismissed.

MR. CHIEF JUSTICE CARTER said :

There is one consideration which has not been referred to in this case which operated upon my mind as finally fixing my judgment. After concurring with my brethren in the conclusion that if the right of appeal existed at all on behalf of the people as against a defendant charged with crime it must exist by express provision of law, I refer to the action of the law-making power, and find that they have intervened on behalf of the defendant only and, therefore, by implication enjoined appeal against him. The provision of the statute is that he may have his remedy in error upon conviction, and inasmuch as the legislative power only provided for a specific case, and a certain condition of the case to entitle it to the judgment of the higher tribunal, it is conclusive to my mind that this matter has no business here.

## KILBOURN &amp; LATTA

vs.

EDWIN H. KING.

- 
1. Where the owner of property places it with a real estate broker for sale who accordingly advertises it, the latter is entitled to his commission if the purchaser derived his information through the broker that the property was for sale, although the negotiations were had with the owner and the purchase was made directly from him.
  2. Where a contract is partly in print and partly in writing, and the written portion only is read over to the contracting party and he then directs his signature to be placed to the paper, he is bound by the agreement although he neither read nor had read over to him, the printed matter, provided he had an opportunity to read it and it was not fraudulently concealed or withheld from him.

Law No. 4252. Decided Nov. 8, 1883.

MOTION for a new trial on exceptions.

## STATEMENT OF THE CASE AND DECISION.

This was an action of assumpsit to recover commissions for the sale of a piece of real estate under a written contract, which consisted of a printed form filled up in writing. The written portion was read over to the defendant and he then authorized his signature to be placed to the contract. It appeared that the defendant could read and write.

The defense relied upon was that at the time defendant authorized his signature to be placed to the contract he did not see the printed matter, and that it was not read over to him.

At the trial the following instructions were granted at the request of the plaintiffs and excepted to by the defendant:

First. If the jury believe, from the evidence, that the defendant placed the property in question in the hands of the plaintiffs for sale, said plaintiffs being real estate brokers, and that said plaintiffs advertised said property for sale, and that the purchaser derived his information that the property was for sale from the plaintiffs, and afterwards negotiated himself with the defendant, and purchased the property, then the plaintiffs are entitled to recover whatever the jury may think their services reasonably worth.

Second. If the jury believe from the evidence, that one of the plaintiffs read to the defendant the written matter on the agreement in evidence, but did not read the printed matter, and that the defendant had an opportunity to read the entire paper, but did not, and directed one of the plaintiffs to sign his name thereto, then he is bound by said agreement, unless the jury further believe that said plaintiffs fraudulently concealed or withheld said printed matter from said defendant's observation.

On hearing and argument in the General Term these rulings were affirmed.

MR. WM. F. MATTINGLY, for plaintiffs.

MR. R. T. MERRICK, for defendant.

NICHOLAS BARTH

vs.

JOHN F. HEIDER.

- 
1. It is no justification for a false arrest, without warrant that the defendant acted upon the advice of a police officer.
  2. Neither a private person nor an officer can arrest without a warrant a person charged with a crime of less degree than a felony if the crime were not committed in their presence.

Law, No. 4,561. Decided November 12, 1888.

MOTION for a new trial on a bill of exceptions in an action of trespass for false imprisonment.

The defendant had caused the arrest of the plaintiff by a police officer without warrant, on suspicion of having stolen his watch and money. The only point in the case considered by the Court was raised by the third exception, and was as to the right of the defendant to justify by showing that he acted under the advice of a police officer. The facts of the case were that the plaintiff occupied a room in defendant's house for about three years, and that they lived together on the most intimate and friendly terms; that on Christmas eve, the defendant missed from his bed room eighty dollars and a watch; that he went to the office of the Metropolitan Police, made known his loss to the officer in charge, and told him that he believed the plaintiff had stolen the money and watch and he wanted him searched; that on Christmas morning, about 10 o'clock, the defendant and one Kelly, an officer, came to plaintiff's room, arrested him and carried him to the police station, where he was confined in a small cell all that day and night; that

the defendant, on the way down, reiterated his charge that he, the plaintiff, had stolen the things, and nobody else; that on the morning of the 26th of December, the said Kelly and the defendant came to his cell and took him before Justice of the Peace Walter, where a hearing was had, the defendant making oath before the justice that he believed the plaintiff had stolen the watch and money; that the justice told the defendant he would have to produce further testimony, and committed the plaintiff to jail for a further hearing; that he was released on bail the same afternoon, and the case, some weeks afterwards, was dismissed without any further hearing; that the plaintiff was a watch maker, and had suffered in his business in consequence of this false accusation, and that the whole proceeding was *without any warrant*.

The general issue, "not guilty" was pleaded, and the jury found for the plaintiff \$500 damages.

MR. WILLIAM F. MATTINGLY for plaintiff:

The offer to show that the plaintiff acted on the advice of Kelly, the police officer, was properly rejected by the Court. As matter of justification it should have been specially pleaded, and was not admissible under the general issue. Ch. Pl. 500, 501. 2 Sel. N. P., 935.

It is no excuse that he took the advice of a police officer; he should have consulted a competent lawyer, and after informing him truly of all the facts, could have availed himself of the advice received. *Ross vs. Inness*, 4 Am. Law Reg., 284.

MR. WM. JOHN MILLER for defendant.

MR. JUSTICE OLIN after stating the case delivered the opinion of the Court:

The third exception raises the question sought to be raised by the counsel for the defendant. That exception is as follows:

"The defendant offered to show to the jury, in justification of the defendant, that there was no malice; that after the investigation of the larceny by said Kelly, and a few seconds before the arrest of the plaintiff by said Kelly, said defendant counseled and advised with said officer Kelly, and the said officer stated to the said defendant that he was sure the said plaintiff had committed said larceny, and that when said plaintiff was arrested he, the defendant acted *bona fide* upon the opinion and advice of said Kelly, and he believed from what said Kelly told him he had just cause of complaint against said plaintiff."

This exception presents the question whether a party who procures the arrest of a person without warrant can justify or excuse the act, by showing that he thus acted upon the advice of a police officer. We think not. (See 4th American Law Register, 284; *Ross vs. Inness*.)

This is, perhaps, all that need be said in this case, but, as the question has frequently arisen in this Court as to the authority of private persons and police officers to arrest without warrant, it may be useful to state what we deem to be the law upon the subject.

1st. As to the right of private persons to arrest. It has long been the settled law, that all persons whatever who are present when a felony is committed or a dangerous wound is given, not only may apprehend the offender, but that it is their duty to do so. 1 Arch, Cr. Pl., 21; 2 Hawk. P. C., 157; East P. C., 377; *Halley vs. Mix*, 350.

So any person whatever, if an affray be made to the breach of peace, may, without warrant, restrain any of the offenders in order to preserve the peace, but it would seem that even this restraint cannot be continued after the peace has been restored. See *Phillips vs. Trull*, 11 Johns., 406.

Neither a private person nor an officer can arrest a person charged with a crime of less degree than a felony without a warrant if not committed in their presence. An officer has no right to arrest a person without warrant guilty

of a misdemeanor after the offense has been committed. See *Proper vs. Adler*, 3 Park; 2 Hawkins P. C., 121; 2 C & P., 585.

Both private persons and officers may arrest without warrant persons guilty of felonies. Upon this subject Chief Justice Savage, in the 3d Wend., 535, states the case as follows: "My understanding of the law is, that if a felony has in fact been committed by the person arrested upon suspicion by a private individual, such individual is excused if a felony in fact was committed and there was a reasonable ground to suspicion the party arrested; but if no felony was committed by any one and a private individual is arrested without warrant, such arrest is illegal, though an officer would be justified if he had acted upon information which he had reason to rely on."

Justice Denny, in *Rohan vs. Savior*, 5 Cushing, 285, says the public safety and the due apprehension of criminals charged with heinous (felonious) offenses imperiously require that such arrests should be made without warrant by officers of the law. As to the right appertaining to private individuals to arrest without a warrant, it is a much more restricted authority, and is confined to cases of the actual guilt of the party arrested, and the arrest can only be justified by proving such guilt; but as to constables and other peace officers acting officially the law clothes them with greater authority, and they are held to be justified if they act in making the arrest in probable and reasonable grounds for believing the party to be guilty of a felony. \* \* \* A peace officer may, therefore, justify an arrest on a reasonable charge of felony without a warrant, although it should afterwards appear that no felony had been committed, but a private individual cannot. See *Samuel vs. Payne*, 1 Doug. R., 359; 2 Hale P. C., 83, 84, 89. We think the true rule of law is laid down in the case of *Rohan vs. Savoir*, and the ruling of the justice at the Circuit Court must be sustained.



JAMES H. BIRDSALL  
vs.  
PHILEMON H. WELCH.

---

1. The setting down of a cause for hearing on bill and answer is to be taken as an admission by complainant of the truth of the whole of the answer, not only of the facts stated in direct response to the bill, but also of all those set up by way of affirmative defense.
2. Whether it be on a trial by jury or in chancery, fraud in fact must be made out affirmatively by the party who makes the charge.
3. Where a suit is pending against a debtor and is approaching trial, another creditor has a legal right to protect himself by taking an assignment of such debtor's property as security for the payment of his debt, and it is no badge of fraud that the property assigned exceeds in amount the claim of the creditor, since other creditors may by paying the debt release the property, or may avail themselves by other modes of the equity of redemption; but the *bona fides* of such a transaction is always one of fact.
4. If there have been good faith and a valuable consideration on the part of the purchaser the deed is valid, notwithstanding there may have been a fraudulent purpose on the part of the grantor to hinder and delay his creditors.
5. Although under the statute of Elizabeth a *bona fide* purchaser without notice takes no title by his conveyance from a fraudulent grantee, yet the rule is different if his purchase be made directly from a fraudulent grantor.
6. Where A, having a judgment for damages against B, levies execution upon personal property previously conveyed by way of chattel mortgage to C, on the ground that the deed of conveyance is fraudulent, and C, replevies from the officer, a verdict and judgment in the replevin suit in favor of C settles the question of fraud and is conclusive evidence to establish the validity of the deed against A in a subsequent suit in equity attacking the same deed as fraudulent.
7. Although courts of equity have concurrent jurisdiction with courts of law in all matters of fraud, yet when the cause has already been tried and determined at law, equity cannot take cognizance of it, unless there be an addition of some equitable circumstance to give jurisdiction, such as some defect of testimony or other disability which a court of law cannot remove.
8. In a replevin suit the marshal is only the nominal defendant; the real defendant is the party in whose name the execution issued.
9. All persons who are represented by the parties to a judgment and claim under them or in privity with them are equally concluded by the judgment and the proceeding in which it was obtained.

10. A promissory note of the complainant held by the defendant in a judgment creditor's proceeding, cannot be allowed as a set-off against complainant's judgment, but the decree will be without prejudice to the defendant's right to proceed at law.

Equity, No. 1,253. Decided November 15, 1868.

BILL in equity by a judgment creditor to obtain the cancellation on the ground of fraud of two deeds made by the judgment debtor, or at all events to have the property conveyed sold, and the plaintiffs debt paid out of the proceeds. The allegation being that the deeds were made pending a suit at law and but a few days before plaintiff recovered his judgment, and that their purpose was expressly to defeat and hinder and delay plaintiff in obtaining satisfaction of such judgment should he obtain it. The answers denied all fraud and alleged one of the deeds to be by way of security. The hearing was upon bill and answers, and the decree below was in favor of plaintiff from which the defendants took this appeal. The further facts are sufficiently stated in the opinion of the Court.

MESSRS. CARRINGTON & WILSON, for complainant.

The conveyances are fraudulent and void and were intended to hinder and delay the plaintiff in the collection of his judgment in the then pending suit for damages if he should obtain it. When a claim is founded either in contract or in tort, for example in an action of slander, the plaintiff from the time action is begun is so far a creditor as to be able to avoid a conveyance made with intent to defraud him. 1 American Leading cases, p. 42; 18 Johnson, 425; 4 Bibb, 165. It also appears, upon the defendant's own showing, that upon a final settlement between Welch and Talmadge, so far from Welch being indebted to Talmadge, there was a balance in Welch's favor of about \$825.05, and therefore the unnecessary and complicated arrangement which they made was obviously intended to defraud plaintiff. The real and personal property is amply sufficient to satisfy plaintiff's judgment, and leave a bal-

ance sufficient to pay whatever may be due Talmadge and the claims of all other creditors of Welch, so far as appears from the pleadings and papers in this cause. A court of chancery will therefore require the property, or so much thereof as may be necessary, to be sold and the proceeds applied to the satisfaction of plaintiff's judgment, and the just claims of all the creditors of Welch properly before the Court.

MESSRS. A. G. RIDDLE and R. S. DAVIS, for defendant.

The appellant in this case insists that Birdsall, the judgment creditor, was not a creditor in contemplation of law until after the judgment was rendered; and that the commission of a trespass, *vi et armis*, does not create a lien on real or personal property from the time of its commission to the rendition of a judgment in the case, and, therefore, Birdsall only became a creditor from and after the date judgment was entered in his favor. *Messerve vs. Dyer*, 4 Greenleaf, 52; *McErvin vs. Bering*, 1 Hawks, 474.

A debtor has a right at common law to prefer one creditor to another. *Brooks vs. Marbury*, 6 Curtis, 517.

A deed made upon a valuable and adequate consideration, which is actually paid, and the change of property is *bona fide*, or such as it purports to be, cannot be considered as a conveyance to defraud creditors. *Wheaton vs. Sexton's Lessee*, 4 Curtis, 454; *Hinds' Lessees vs. Longworth*, 11 Wheat., 199; *Sexton vs. Wheaton*, 8 Wheat., 242.

MR. JUSTICE WYLIE delivered the opinion of the Court:

This professes to be a creditor's bill, filed by Birdsall, to set aside as void for fraud two deeds made by the defendant Welch, and to subject the property thereby conveyed to sale, under decree of this Court, for the common benefit of Welch's creditors; or, in any event, to have the property sold and the proceeds afterwards distributed under the directions of the Court, whether the deeds be fraudulent

or not. Both these deeds bear date the 2d of December, 1867. One was a deed of trust to R. S. Davis, assigning all the household furniture and stock in trade belonging to Welch to secure certain debts due by him to the defendant, amounting to more than \$3,000.

The other was a deed of absolute conveyance from Welch to Talmadge for a house and lot in this city for the consideration of \$10,000.

At the time these deeds were executed there was an action pending at law in this Court, brought by Birdsall against Welch, claiming damages for false imprisonment, which came on to be tried just two days after the execution and delivery of the deeds, and which resulted in a verdict and judgment in favor of the plaintiff, for \$875 and costs.

The bill charges that both the deeds were made without consideration, and with the fraudulent purpose on the part of Welch and Talmadge to defeat the collection of the judgment which they expected would soon be entered in the said action for false imprisonment.

The answers of these defendants show that Talmadge was a creditor of Welch at the time for the full amount of the debts secured by the deed of trust to Davis and more, and aver that the deed was given in good faith to secure those debts, and with no intent to delay, hinder or defraud Birdsall, although Talmadge says he was aware at the time it was given of the pendency of the action against Welch.

Welch further alleges, in his answer, that he is the holder of Birdsall's promissory note for a valuable consideration, amounting to \$433, which he prays to have set off against Birdsall's judgment.

He also claims, by way of plea, that the question of fraud in the deed of trust to Davis was determined in a trial at law in this Court in an action of replevin, in which Davis was plaintiff and the complainant, Birdsall, was the substantial defendant.

The proceedings in that action are also referred to by complainant and made an exhibit to his bill.

The record of that case shows that after Birdsall had obtained his judgment against Welch, he issued an execution for its collection ; that his counsel indemnified the marshal and had a levy made on the property which had been assigned to Davis as trustee, treating Davis' deed as void ; that Davis replevined the goods ; that the cause was tried by jury, and a verdict and judgment obtained in his favor, nominally against the marshal, but substantially against Birdsall, who was the plaintiff in the execution. As to the absolute deed from Welch to Talmadge, it is shown by the answer that Talmadge was induced to make the purchase in order to get Welch to give him the security for his deed of trust to Davis, and that both deeds were the result of the same negotiation.

It is further shown by the answers that at the time of the sale the real property was incumbered to the amount of \$7,400 ; that Talmadge undertook to pay off the incumbrances and gave his promissory notes to Welch for the balance (\$2,600) which Welch immediately thereafter transferred to Mayo & Co., of Richmond, towards satisfaction of a debt greater than the amount which he owed to that firm. These notes were secured by a deed of trust given by Talmadge upon the property.

This cause was set down for hearing by the complainant on bill and answers, and, there was necessarily no testimony taken on either side, but as we are to determine the controversy solely on the pleadings, it is important that we should consider in the outset the effect of setting down a cause for hearing on bill and answer.

This is always the act of the complainant in a cause ; it cannot be done by a defendant. Its effect is to deprive the defendant of the opportunity to establish the defense by testimony. If complainant intends to deny the truth of the defendant's answer, it is his duty to do so by filing a replication, which would put the cause at issue, and then defendant has the right to make out his case by evidence.

By setting down the cause for hearing on bill and answer, complainant is taken to admit the truth of the whole of defendant's answer, not only of the facts stated in direct response to the bill, but also all those set up by way of affirmative defense. Otherwise, it would always be in the power of the complainant to deprive the defendant of the opportunity of taking evidence to establish the defense set up in his answer. This doctrine is perfectly reasonable, and fully settled by all the authorities. See Cooper's Eq. Pl., 328, 329, and Story Eq. Pl., ch. 19, sec. 877.

The answers in this case must, therefore, be taken to be true, not only so far as they are responsive to the bill, but also as to all their new and affirmative statements of facts.

Whether it be on a trial by jury or in chancery, fraud in fact must be made out affirmatively by the party who makes the charge.

In the present case, we find nothing on the face of the transaction which amounts to fraud in law. If there be fraud in the case, it must be found in the motives of the parties to whom or for whose benefit the deeds were made.

Talmadge was a creditor of Welch and as the answers show, a most meritorious creditor. His claims were part due; the defendant Welch was in failing circumstances. If Birdsall should obtain a judgment to a large amount against Welch, the very property which in equity and good conscience is shown to have belonged to Talmadge, might be swept away by Birdsall's execution and Talmadge ruined in fortune. He had a perfect right to secure himself, and it was his duty to do so, promptly and vigilantly. It was not even a badge of fraud to take security or property beyond the amount of his claim, if that was done in this instance, which is doubtful. In *Donns vs. Kissam*, 10 How., 108, the Supreme Court reversed a judgment on the ground that the Circuit Court had told the jury that this circumstance was a badge of fraud. It is no badge of fraud, "says the Court," for a mortgage which is a mere

security, to cover more property than will secure the debt due. Any creditor may pay the mortgage debt and proceed against the property, or he may subject it to the payment of his debt by other modes of proceeding."

Were it true in law that no creditor could take measures to secure himself from loss by a debtor against whom actions were pending and near trial, because his doing so might defeat or delay the collection of judgment, for the same reason no judgment creditor ought to be permitted to avail himself of his superior diligence, because to do so would defeat the claims of other creditors who had not been equally diligent. For a judgment is only one form of security, and in itself is not more meritorious than a mortgage or deed of trust; otherwise diligence itself would become a badge of fraud, and so every security would be void for fraud, except such as might be satisfactory to everybody. In cases arising under the statute of Elizabeth, Ch. 5, it may be laid down that under almost any circumstances (if the cause be a trial at law) the question of fraud or no fraud is one for the consideration of the jury. So, too, in chancery there are no rules establishing particular circumstances to be indelible badges of fraud, but the question of *bona fides* is there also one of fact. (See 1st vol. Smith's L. Ca. 41.)

In the present case good faith on the part of Talmadge is perfectly reconcilable with all the facts before us, and is solemnly declared by him in his answer under oath as to both transactions, and is admitted by the complainant in his act of setting down the cause for hearing. Whatever may have been the design of Welch, the good faith of Talmadge is enough to sustain these deeds. If there have been good faith and a valuable consideration on the part of the purchase, the deed is valid, notwithstanding there may have been a fraudulent purpose on the part of the grantor. In *Astor vs. Wells*, 4 Wheat., 517, the Court held that the fraudulent purpose of the debtor to cheat his creditors by

conveying his property would not affect one who had purchased the property in good faith.

And in *Roberts and Boyd vs. Anderson*, 3 John. Ch. R., the same doctrine was laid down by Chancellor Kent while he took occasion to retract an erroneous opinion on the point which he had expressed in another case. "Such a conveyance," he says, "is supported by the proviso (in the sixth section of the act of 13th Elizabeth) however fraudulent the intention of the grantor might be, and the contrary impression which I had once received on this point from some of the English cases, without at the time adverting to this proviso, and which led me to the dictum in *Hildreth vs. Lands* (2 Johns. Ch. R.), was properly corrected by Mr. Justice Spencer, when that cause was afterwards before the Court of Errors. (14 Johns., R. 498.)"

As to the real estate, that property was sold for a fair consideration; the purpose to defraud creditors is positively denied in the answer, and we are not at liberty to say in this case that the admitted facts require us to declare that fraud existed in the face of these answers, and with no proof to weaken their effect but with the contrary admissions of the complainant in setting down the cause for hearing on the bill and answers.

Besides the answers show and complainant admits that of the purchase money (\$10,000) \$7,400 were already liens on the property. They at least are beyond our reach. The residue, \$2,600, consisting of the purchaser's notes, were immediately after the sale transferred to Mayo & Co. towards the payment of their claim against Welch. Mayo & Co. are therefore in equity the owner of the deed of trust which secures these notes, for the assignment of the notes carried with it the deed of trust which secured them. To make a decree annulling that sale would destroy that security. How can we do that when Mayo & Co. are not parties to this suit? They were at the time creditors of Welch quite as meritorious as the complainant. They have, therefore,



equal equity in this Court, and besides have a legal advantage in their deed of trust of which we ought not to deprive them.

Although under the Statute 13th Elizabeth, chap. 5, a *bona fide* purchaser without notice from a fraudulent grantee gets no title by his conveyance, because his grantor's title was void, yet the rule is different if his purchase be made directly from a fraudulent grantor. In this last case, the proviso to the sixth section saves his conveyance, notwithstanding the fraud of his grantor. This doctrine was laid down by Ch. Kent in *Roberts and Boyd vs. Anderson*, 3 Johns. Ch. R., 371. •

In the case before us Mayo & Co. were *bona fide* purchasers without notice from Welch himself of the security which he had reserved on the property in question for the payment of the notes. They are, therefore, protected, even if Welch had been fraudulent in giving them the security.

Nor is the case made better for the complainant by regarding both these transactions as parts of one, for it is not easy to see how one transaction consisting of two parts, both of which are free from fraud, could become fraudulent when considered together.

But the sale of the real estate to Talmadge was not a fraud in law. If allowed to prove his case he might have shown that it was perfectly honest in purchase, and whatever he might have established by proof this complainant admits to be true.

But to this charge of fraud there is another answer which appears on the face of the bill itself, and is also insisted on in Welch's answer to the bill. It is that the whole matter has been tried in the action of replevin, and a verdict and judgment therein rendered in favor of the defendant.

The question of fraud in this case is manifestly one of fact, and most proper to be tried by a jury. After complainant had got his judgment for damages against Welch, he issued his execution, indemnified the marshal, and levied

on the personal property covered by Davis' deed. Davis replevied the property, and the cause was tried by jury and a verdict and judgment rendered in favor of Davis. That verdict and judgment settled the question of fraud, and established the deed, and is conclusive against the complainant in this suit as to the personal property. And if the complainant insists that both deeds are parts of one transaction, and the whole must stand or fall together, it is conclusive in favor of the other also.

In *Smith vs. McIvor*, 9 Wheat., 532, it was held that in all cases of concurrent jurisdiction, the Court which first has possession of the subject must determine it conclusively, and that although courts of equity have concurrent jurisdiction with courts of law in all matters of fraud, yet when the cause has already been tried and determined by a court of law, a court of equity cannot take cognizance of it, unless there be an addition of some equitable circumstances to give jurisdiction. In such case some defect of testimony or other disability which a court of law cannot remove must be shown as a ground for resorting to a court of equity. See also *Bank of U. S. vs. Beverly*, 1 Howard, 143.

This complainant is estopped by that verdict and judgment; for although the action of replevin was nominally against the marshal, Birdsall was the substantial party.

The law on this point is plainly stated in 1 Greenleaf's Evidence, sec. 523, as follows: "But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings." \* \* \* "The ground upon which persons standing in this relation to the litigating party are bound by the proceedings is, that they are identified with him in interest; and wherever this identity is found to exist all are alike concluded."

We are brought to consider the nature of the decree to be rendered in this cause.

Laying out of view the effect of the verdict and judgment in the action of replevin, complainant having obtained his judgment and issued his execution before instituting the present suit, and having failed in his effort to collect his money by these means, he had a right to the aid of this Court to set aside the deeds to Davis and Talmadge, if they were fraudulent, and to have the property sold for his own benefit. It was error to put his bill in the form of a creditor's bill, but that is immaterial. That relief we cannot afford him in this case, for we must take both these deeds to be valid.

He has a right, however, to redeem the property from the lien of Davis' deed of trust by paying off the debts which it secures, and then selling the property to reimburse himself for the amount thus advanced, as well as to secure payment of his judgment, and if the property assigned to Davis be as valuable as the bill alleges, it will be his interest to do so. If he does not choose to take that risk he may renew his execution, and so retain a lien on the surplus which may remain in Davis' hands after the debts secured by that deed have been satisfied. But for either of these purposes he has the remedy in his own hands without our aid. We cannot, however, hold those deeds to be valid, and yet decree a sale of the property under this bill.

The sale of the real estate to Talmadge was absolute, and it is therefore beyond our reach. Davis is a trustee who has been charged with no fault in the performance of his duty, and we cannot, therefore, remove him. It is to be presumed he will sell the property, as required by his deed, and faithfully execute the trust he has assumed.

The bill must therefore be dismissed.

As it regards the set-off claimed by the defendant, a majority of the Court is of opinion that it cannot be allowed in this cause; but the plea is overruled without prejudice to defendant's right to bring his action at law.

In that opinion I do not concur. I think it a proper de-

fense so far as it goes; its justice has not been denied by the complainant, and, as we have the parties concerned before us, I think we ought to settle their whole controversy, and direct the amount of the set-off to be credited on Birdsall's judgment.

MR. JUSTICE OLIN delivered the following dissenting opinion:

On the 4th December, 1867, the complainant obtained a judgment at law against the defendant Welch, for \$875 damages exclusive of costs. Upon this judgment he issued an execution and the Marshal of the District levied on certain personal property in the possession of the defendant Welch, which property was replevied by one Davis and a judgment recovered in the latter suit by Davis against the marshal.

The plaintiff then files a bill in equity usually known as a creditors bill charging that certain conveyances of his personal and real estate made at or about the time of the recovery of the judgment by the complainant were fraudulent and void, and made to hinder and delay his creditors and especially the complainant. These several conveyances are made exhibits in the case both by bill and answer of defendant Welch.

The bill seeks to set aside these conveyances by Welch and subject the property to the payment of the plaintiffs judgment.

Welch in his answer does not deny that these several conveyances were made with intent to hinder and delay Birdsall and other creditors, but sets up the defense that the judgment recovered by Davis in the replevin suit is a bar to all inquiry in a Court of Equity, not only whether the conveyance of such personal property was fraudulent and void but that the real estate conveyed at or about same time by a different instrument could not be questioned or inquired into although the conveyance upon its face showed it to be fraudulent and void as against creditors.

This defense was very properly abandoned at the hearing in the Court below, and has not been made a point in the argument of the cause in banc.

There are several answers to this supposed defense :

1. The plea or answer does not cover the whole case, as it concerned only the personal property.

Judgment of a court of law is no bar to a suit in equity where fraud is charged in the bill. See sec. 784, Story's Equity Pleading: "If there is any charge of fraud, or if other circumstances are shown by the bill as a ground of relief, the judgment or sentence cannot be pleaded by a plea in bar of the bill."

3. There is no plea in the case, and if all forms of pleading were to be disregarded, the facts stated in the answer amount to no defense to the bill if arranged by the most ungenerous bearing of special pleading.

Two questions are presented by the bill and answers in this case:

1. Were these several conveyances by Welch made with intent to hinder, delay or defraud Birdsall in the collection of his demand? and

2. Were these conveyances fraudulent and void as against the creditors of Welch?

The first is purely a question of fact in this case to be judged of by the statements contained in the bill and answer of Welch.

As I am fully aware that different minds may draw different conclusions from a given state of facts, I can therefore feel no surprise that others do not see under the circumstances of this case a fraudulent intent to hinder or delay creditors. Nevertheless I have come to the conclusion that there was such fraudulent intent, although my brothers who have had the same opportunity to judge of that intent, and are certainly as well, and doubtless better, able to do so than myself, have come to a different conclusion.

I will only state the facts in the case which induce me

to believe that the disposition of his property made by the defendant, Welch, was made with intent to hinder and delay and defraud the plaintiff.

Birdsall was prosecuting Welch for an alleged malicious arrest and false imprisonment. We may, I think, naturally suppose that in such a controversy there was no very kindly feeling subsisting between these parties. Just two days before the verdict is rendered in the case Welch makes such a disposition of his property real and personal as to prevent Birdsall from reaching it on execution, if he should obtain a judgment.

Now, take that fact in connection with the character of the transfer of his property he then made and my mind is forced to the conclusion that the leading object, purpose and intent of those conveyances was to prevent his property being reached by any judgment Birdsall might obtain; those conveyances while they attempt to put the property of Welch beyond the reach of an execution in favor of Birdsall leave Welch in possession of a greater portion of the property.

Here is then a contrivance by which a judgment creditor is set at defiance, and the debtor is left in possession and enjoyment of property which according to law belongs to his creditor.

It was said on the argument of this case by one or more members of the Court that a debtor had the right to prefer one creditor over another, even if he made that preference with the intent to hinder and delay another creditor in the collection of his just debt; such conveyance was valid in law.

I by no means assent to that proposition; while I agree that it is a well settled rule of law that a debtor in failing circumstances may dispose of his property in payment of his debts, giving preference to such of his creditors as he chooses, I still think if he make such preference with intent

to hinder or delay some other creditor in the collection of his debt such conveyance is fraudulent and void.

This is the plain explicit language of the statute; if the conveyance be made with the intent to hinder and delay the creditor, it is void; this question of intent is a fact to be found by Court or jury, but if found, the law pronounces the conveyance void. See *Cadogan vs. Kennett*, decided by Lord Mansfield, 1 Cowp., 434. In the case of *Bozman vs. Draughan*, 3 Stewart, 243, the Supreme Court of Alabama "held that a conveyance with intent to hinder and delay creditors in the collection of their debts was void as against such creditors, though on valuable consideration." The Court of Appeals in Kentucky, in the case of *Vernon vs. Morton*, 8 Dana, 247, held "If the intention in executing the deed be to hinder and delay creditors it will vitiate the whole deed though it be made upon a good consideration, or for the just and equitable purpose of securing an equal distribution of the effects among all the creditors."

In the case of *Nicholson vs. Leavitt*, 4th Sandf., 252, (New York), it is held that an intent to defraud is implied in the intent to hinder and delay creditors, and in answer to the argument that an intent to hinder and delay creditors, there being no intent to defraud them, will not make an assignment illegal, and that a positive intent to defraud must exist, the Court say that a positive intent to defraud always does exist where the inducement to the trust is to hinder and delay creditors, "since the right of a creditor to recover his demand when due is as absolute as the right to recover at all."

Again, in *Bank vs. Sherman*, 2 Douglass, 176, it was held by the Supreme Court of Michigan, "that fraud in fact or an express intent to commit fraud is not necessary in order to render a conveyance fraudulent as against creditors. It is sufficient if the effect of the conveyance is to hinder and delay creditors in the collection of their debts."

In *Mitchell vs. Stiles*, the Supreme Court of Pennsylvania

1 Harris, 306, say: "Whatever the private or actual intent of the deed may have been, it wears the marks which for the benefit of creditors as a matter of public policy the law construes into badges of fraud. Its whole scope and effect is to delay, hinder and obstruct creditors, it is therefore void, and it has been well said by an able American writer in summing up the law on this point, that an assignment in trust for creditors which by its provisions tends to hinder or delay creditors is fraudulent and void in law. See 4 Denio, 217; 7 Howard, 277; 1 Harris, 185.

I hope sufficient has been said to show both from reason and authority that if a transfer of property has been made with the intent to hinder or delay creditors, that transfer is fraudulent and void in law, notwithstanding it be made in payment or satisfaction of an honest and just debt.

I come now to the question whether the conveyances which were made by Welch are upon their face as matter of law, fraudulent and void as against creditors. These several conveyances are a part of the answer; they are called for by the bill and made a part of the answer by the defendant Welch.

I have observed that in the answer of Welch he does not deny that the conveyances he made were made with the intent to hinder and delay creditors, especially Birdsall the plaintiff, except that at the conclusion of his answer he denies all fraud and combination. This allegation is by no means any answer to the charge in the bill, that the conveyance was made with the intent, or as the pleader has stated, with a view, to hinder and delay creditors. It was a very easy thing to say and swear to, if true, that these conveyances were not made with either "a view or the intent to hinder and delay creditors," &c., but by his answer he can only afford to swear that in all these matters he acted in good faith and without fraud. He doubtless believed under the advice of counsel that it was fair and honest to prevent Birdsall from realizing anything upon any judgment he



might obtain and acted in good faith in contriving the means to prevent it.

It is sufficient to say that allegations of this kind "acted in good faith, *bona fide*, not guilty of fraud, are as idle as the wind by way of answer to a specific fact. The charge in the bill is that he made these conveyances with intent to hinder and delay the complainant in the collection of his debt, the answer is, not that he did not make them with that view or intent, but that he acted *bona fide* and without fraud.

I recur again to the question whether these conveyances by Welch are upon their face fraudulent and void in law as against his creditors.

It would seem from the face of these conveyances that on the 2d of December, 1867, and two days before Birdsall recovered judgment, the defendant, Welch, executed two assignments of his property including all his personal and real estate subject to execution. It was admitted on the argument, and the facts of the case show, that he was at the time hopelessly insolvent.

He assigns his personal property to the defendant, Davis, in trust to pay on demand \$1,157, and six months after date, what date does not appear, \$2,000; "that in case default shall be made in the payment of said sums, default pray by whom? Of course Welch. Then Davis shall proceed and sell, after advertising as prescribed, the property assigned, and "out of the money arising from the sale thereof, to retain and pay the said several sums as above mentioned, or such sums as shall remain unpaid at the time of sale and all charges touching the same and including five per cent. to the said party of the second part (Davis) for his diligence and trouble in executing this trust. And the remainder if any to pay over to the party of the first part or to his heirs or assigns."

At the same time Welch and his wife executed a deed of his estate to the defendant Talmadge in consideration of \$10,000, as expressed in the deed, and at the same time Tal-

madge executes to Davis a deed of trust to secure the purchase price of the real estate. It recites that Talmadge is indebted to Welch in the sum of \$9,000, on four promissory notes payable to Welch in six, twelve, eighteen and twenty-four months after date and conditions that if these notes are not paid at maturity Davis may proceed to sell the property, and out of the proceeds pay the notes to Welch and the balance if any to Talmadge.

I repeat that at the time of these conveyances it was conceded on the argument both below and in this Court that Welch was hopelessly insolvent even if the plaintiff's judgment be blotted out. What have we then upon the face of these papers?

An insolvent conveys all his personal estate in trust to pay a particular debt and reserves the surplus, if any, to himself. At the same time he transfers all his real estate for the consideration of \$10,000, and reserves \$9,000 payable to himself in 6, 12, 18, and 24 months.

Never in the history of frauds which have come under my observation was one so stupidly conceived, or so bunglingly executed as this.

These conveyances were made at the same time, doubtless under the advice or superintendence of the defendant Davis; Welch apprehending a judgment might be obtained against him, transfers his personal property to Davis directing him to pay out of its proceeds certain debts, and pay the balance if any to him; the personal property is thus supposed safe from any execution of Birdsall.

He then transfers his real estate to the defendant Talmadge and takes his notes for \$9,000, payable in 6, 12, 18 and 24 months, and thus it was supposed the proceeds of his real estate were not subject to execution.

I suppose it can scarcely be necessary to cite authorities to show that if a debtor in failing circumstances makes an assignment of a part of his property in trust to pay one or more of his creditors and reserves the balance if any to him-

self instead of appropriating it to the payment of other of his creditors the transfer is fraudulent and void in law.

I will refer for convenience to the case of *Goodrich vs. Downs*, 6 Hill, 438, because it is so precisely in point with this case. The Court in that case held, that where an assignment was made by a debtor in failing circumstances, of the principal part of his property to pay one or more of his creditors, and provided that the surplus if any should be returned to the assignor, his heirs, &c., such assignment was fraudulent and void upon its face, the provision as to the surplus being a trust for the use of the assignor. This was the precise provision of the deed from Welch to Davis.

The judgment of the Court at Special Term, I still think ought to be affirmed.

JOHN R. ARRISON ET AL.

vs.

WM. A. COOK ET AL.

- 
1. Where on a return to an application for mandamus against the Board of Registers of Election to compel the striking of certain names from the list of voters, it appears that the board has fully exercised the judgment and discretion entrusted to it by the law in determining the qualifications of applicants, and that the board is satisfied that the persons registered are residents of the District, and it does not appear that any fraud or corruption was practiced by the board, the Court will not go behind the answer to take proof whether the persons registered were voters.
  2. The writ of mandamus will not be issued where it appears that to do so would be futile to obtain the object sought by the relator.

Law, No. 4831. Decided May 30, 1868.

APPLICATION for mandamus to compel the Board of Registers of Election to strike the names of certain alleged disqualified persons from the list of voters.

THE FACTS are sufficiently stated in the opinion.

MESSRS. TERRY and RIDDLE for relators.

MESSRS. COX and DAVIDGE for respondents.

MR. CHIEF JUSTICE CARTTER delivered the opinion of the Court:

The Court has come to the conclusion to refuse the application in this case for a writ of mandamus. We do not find that clear authority for the intervention of the writ that we would desire to find before granting it.

In the case made the fact is presented that five or six United States soldiers, taken from Russel barracks, are presented for registration in this city as voters of this city, and

in the relation they are charged as being non-residents, except so far as this is at present the place of their military habitation.

In reply to this relation it is said by a majority of the judges that to propounded questions they made satisfactory answers; and that among these questions was one as to whether they were citizens of this District. To that question they made an affirmative answer which, the judges say, was satisfactory to them. There is nothing in the case which shows that the judges acted in bad faith, or with any other purpose than to ascertain who were and who were not citizens of Washington; and the Court is enlightened only by this relation, and this answer, except so far as they are advised by the return of a minority of the judges, which, while we received it and permitted it to be placed upon file, we do not feel ourselves at liberty to regard it as overruling the return of a majority of the board. We feel that we are concluded by the answer of the majority. The question supervenes whether upon that simple issue the Court is sufficiently advised that it should grant the writ. We think not.

We have come to the conclusion that in the absence of any appearances of fraud or corruption on the part of the judges, or any conspiracy to impose upon the ballot box in the discharge of their duties, and where it appears, also, that those duties are to be exercised under the discretion and judgment of the board, which discretion and judgment has been fully exercised, we must leave the case to be determined alone upon the return and answer.

Another consideration has operated upon the mind of the Court in refusing this writ. To make a writ of mandamus effective it must have a remedy within its reach. It must be capable in its execution of redressing the wrong complained of. The Court is made aware of the fact that on Monday the election is to take place; that the work of reg-

istration has been closed. The mandate that would go forth from the Court would be that that board should reassemble to open its work of correcting the list. Under the law its reassembling is made to depend upon notice. No time remains to give that notice, and no time remains to give opportunity to correct the list; therefore, if the writ goes out, it will go out without the possibility of being executed.

These two considerations have prevailed on the majority of the Court, and brought us to the conclusion to deny the issuing of this writ without passing any judgment upon any other question involved.

JOHN W. MEAD

vs.

JOSEPH G. CARROL.

1. The board of judges of election created by the act of February 5, 1867, is not a judicial tribunal whose decision is final, but its acts are subject to the investigation and revision of this Court, who in a contested case may go behind the official return for the purpose of ascertaining who was really elected.
2. Soldiers of the United States army do not acquire nor lose their citizenship by reason of being stationed in the line of duty at any particular place, no matter how long their occupancy of such place may continue.
3. A person leaving temporarily and for a particular purpose, his abode or fixed habitation, as for business, pleasure, or health, with the intent of returning to the same as soon as such purpose shall be accomplished, does not lose his residence or habitation.
4. So, soldiers and seamen may be legal residents and inhabitants of a place although they may have been absent therefrom for years, they do not lose their residence or domicile by following their profession.

Law No. 5065. Decided November 19, 1868.

Contested election case under the Act of Congress of June 16, 1868.

MESSRS. MERRICK and DAVIDGE, for petitioner.

MR. A. G. RIDDLE, for respondent.

MR. CHIEF JUSTICE CARTER delivered the opinion of the Court:

The case before us is based upon the complaint of the petitioner that he is the duly elected successor for the fifth ward of the City of Washington, having received a majority of the legal votes polled at the election held on the 1st day of June, 1868. The undisputed facts of the case show that at the election referred to 1,920 votes were polled, of which, according to the returns of the commissioners of election, the petitioner received 972 and the respondent 940, leaving a majority of 31 for the petitioner, exclusive of 7 votes given

for Joseph Carrol, which ought to have been accredited to the vote given for *Joseph G. Carrol*, thus making the actual majority, according to the returns, 24.

This majority, in the absence of other explanation, would entitle the petitioner to the office which he claims, and raises the necessity of further inquiry into the legality of the election. In the prosecution of further inquiry it has been objected that the return of the commissioners, based upon the list of voters furnished them by the judges of election is conclusive, behind which neither the register, in granting the certificate of election, nor this Court can go. With regard to the power of the register in the premises, it is not important for the present purposes of the inquiry to determine. We find the certificate issued, and the respondent in possession of the office; whatever the Court may say upon this subject, therefore, is merely advisory of the future action of the register.

The law provides "that whenever any person has received, or shall hereafter receive, a certificate from the register of the City of Washington, *based upon satisfactory evidence furnished by the commissioners of election*, notifying him of his election to any elective office of said city, the person receiving such notification shall be entitled to enter upon the discharge of the duties of his office, and the certificate of the register shall be *prima facie* evidence of his election to and right to discharge the duties of said office."

It would appear from this statute that the range of this investigation and judgment is limited to the evidence furnished by the commissioners of election, and that evidence necessarily confined within the sphere of their duties.

If the objection be well founded that the Court may not go behind the act of registration, and the return of the commissioners based upon that act, the first suggestion that occurs is, that the investigation ends where it begins, and the provision of the statute of June 16, 1868, section 4—

"*And be it further enacted*, That any person who *claims*, or



shall *hereafter claim*, to be elected to any elective office in said city, may commence proceedings before *the said Supreme Court* of the District of Columbia, by petition *setting forth the facts* upon which he relies, and shall serve a copy on the incumbent or person who has received the certificate of election, and the person so served shall make answer to said petition within five days; *and said Court* shall thereupon *try* the rights of the parties to said office in a *summary* manner, and for that purpose a special session shall be called and held whenever necessary for the purposes of such trial; and the decision of *said Court* in any case so brought before it, shall be final and conclusive,"—was enacted in vain. And if this be so, this Court has no power to try the right of the parties to the office, nor is there any value in the provision that their determination shall be final and conclusive, inasmuch as the objection provides a final and conclusive judgment before the case reaches the Court. The conclusiveness of the determination of the board of judges of election in the act of registration is based upon the theory that they constitute a judicial tribunal, the finding of which is the end of the law in the matter under investigation. In this view the Court do not concur. They are in no sense a judicial tribunal. They are simply organized to discharge the duties of the officers of election, as they have been exercised and understood by similar officers under the name of judges or inspectors of elections hitherto charged with the duty of receiving legal votes and rejecting illegal ones. This is made apparent in the law of their creation, "section three of the Act of February 5, 1867," which simply makes it their business to prepare a list of "*qualified*" voters, to be used at the election. If a judicial tribunal, they are such without parties and without process, or any other of the exact and reliable instruments of justice. If the case was left to rest upon reasons to be derived from the nature and character of their duties, there would be no doubt in our minds, that the judges of

election do not come within the character of a judicial tribunal, and that their acts are subject to an examination by the Court in all cases of contest. But the question does not rest here. The Court are not without the aid of express authority upon the subject. The action of Congress in every case that has transpired since the organization of the Government, from the First to the Fortieth Congress, overrules the objection by sweeping away certificates, returns, and all other supervening obstacles of form and ceremony to reach the last important fact, as to which of the contestants received a majority of the legal votes, uniformly regarding the question, "who has been elected," as paramount to the formula of proof as to the election. But it may be replied to the precedents and rulings of Congress that such action is not authority for courts at law, inasmuch as that body is a law unto itself. We treat it as authority because the conclusion is essentially right.

But we are not left to the authority of Congress in enlightening the subject before us. The question is not new in the courts, as will be seen by reference to the case of *Auld vs. Walton*, 12th Louisiana Annual Reports, page 129, in which case, based upon a statute similar to the one before us, the Court makes use of the language:

"We view the office of registry, under this statute, as a special tribunal for the return of the right to vote in New Orleans, whose certificate is in the nature of a judgment, which is not subject to revision by the commissioners of election. We do not hold, however, the judgments of that tribunal to be without appeal. The ninth section of the act provides a mode of redress, by suit against the register, for an applicant to whom the register shall refuse a certificate. And the validity of the certificate and *the sufficiency of the proof upon which it was based may in all cases be examined upon a contest of election by the tribunals having jurisdiction of such contest.*"

Again, in the case of the Commonwealth *ex rel.* *Leslie vs.*

The County Commissioners, 5th Rawle, p. 77, the Court say: "But conceding that the commissioners have no discretion in relation to the return (a point which I shall hereafter notice), yet it is not perceived how this helps the relator's case, unless it can be shown that the return is conclusive on the Supreme Court, and that in fact there is no tribunal in the commonwealth competent to examine into and correct gross fraud or illegality of procedure on the part of the returning officer."

Then, on page 79, "without adverting particularly to the form of the return, it must be observed that two returns were made, and it was for them to determine which return was correct, or whether either of them should be received. As it is made the duty of the commissioners in a certain event to appoint. That seems necessarily to imply the power to inquire whether the event had taken place, on the happening of which it became their duty to act. It is startling doctrine that, in case of a notorious fraud, or a probable violation of the law, a constable could palm an officer on the public by the force of his return. If this be the law, it is useless to go through the mockery of an election. The constable may return whom he pleases, always taking care that his return is correct upon its face. It would be better to give the appointment to the constable at once without the useless ceremony of an election. The act admits of the construction which we have given it, nor do we perceive any danger in committing to the commissioners the power to examine into the illegality of elections conducted as this has been. The election is local, but the commissioners represent the whole country. They may be fairly supposed to be in some measure exempt from the feelings which act on the electors of the ward or township and therefore a reasonable hope may be entertained of something like impartiality. If, however, this hope should fail, the aggrieved party may resort to an information, when the *whole* case will be examined and right and justice done."

The same doctrine is asserted in the case of the Commonwealth *vs.* Francis Aglar. Thacher's Criminal Cases, p. 412; also, in the case of the Commonwealth *vs.* James Wallace, Thacher's Criminal Cases, p. 592.

Both reason and authority are, therefore, conclusive with the Court as to their right and duty to postpone all returns and certificates to the greater duty of ascertaining who was elected by the people on the occasion of the election in question. In the discharge of this duty the Court is without embarrassment. It is made to appear by uncontroverted proof that eighty-five soldiers in uniform were registered and voted. These soldiers were on duty at Russell Barracks with no other residence within the precinct where they voted than the stay of a soldier under the command of his superior. It is further in proof that all save one voted for the petitioner and against the respondent. This was in direct contravention of the law of Congress passed May 16, 1868, which provides that the first section of the act entitled "An act to regulate the elective franchise in the District of Columbia," passed January 8, 1867, "shall not be construed as conferring the elective franchise in said city on non-commissioned officers, soldiers, sailors, or marines in the regular service of the United States, stationed or on duty in said city, except such as may have become regular residents with their families in said city for one year previous to any election."

And also in violation of all the laws of domicile as laid down by the text books and the Courts. In the case of the People *ex rel.* Orman and Riley, 15th California, pages 49 and 50, which involved a question similar to the one in this case, the Court says: "

"This was a contest for the office of sheriff. The only point we think it necessary to notice is the objection to the admission of a muster roll offered to show that some contested votes at one of the precincts of the county were given by soldiers of the United States Army stationed there. The

*mere fact* that the men voting were soldiers of the United States Army did not disqualify them from voting. But they were not entitled to vote unless citizens of this State and of the county for the required period before the election; *and a mere residence or sojourn in the county in this capacity does not make them citizens or prove them to be such.*"

"The rule as fixed by the Constitution is, that the fact of such sojourn or residence as soldiers, neither creates or destroys citizenship, leaving the political *status* of the soldier where it was before." \* \* \*

"It seems to us that the proof that these men were soldiers, and not citizens of the county, is very simple. It could, we presume, be easily shown that these men came into the county as soldiers, and that they have been since acting as such, and that they were not citizens of the county before; and thus the presumption would show that they were not legal voters."

Again, in the case of *Cranford vs. Wilson*, 4th Barbour, page 522, the same principle is laid down as follows:

"From the various definitions of the term residence, habitancy and domicil, and the decisions in regard to them, I think we can deduce the proposition that the term legal residence or inhabitancy and domicil mean the same thing. By legal residence I mean the place of a man's fixed habitation; where his political rights, such as the right of the elective franchise are to be exercised, and where he is liable to taxation. A person leaving such abode or fixed habitation temporarily, as for a particular purpose, either for pleasure, business or health, with the intent of returning to the same as soon as such purpose is accomplished, *does not lose his residence or habitancy* in such place of abode. The actual residence is not always the legal residence or inhabitancy of a man. A foreign minister actually resides and is personally present at the court to which he is accredited, but his legal residence or inhabitancy and domicil are in his own country.

His residence at the foreign court is only a temporary residence. He is there for a particular purpose. So soldiers and seamen may be legal residents and inhabitants of a place, although they may have been absent therefrom for years. They do not lose their residence or domicile by following their profession."

Other authorities to the same effect might be referred to, but it is unnecessary. But if there could be any question as to the legality of these eighty-five voters the whole case is relieved of any embarrassment by positive proof that the nominal majority given to the petitioner on the face of the return was more than countervailed by the votes of soldiers who had not resided within the District of Columbia, either in camp or out, for the period of one year. In fact this military vote was a flagrant fraud upon the citizens of this ward and of the City of Washington, made up, as it was, from the ballots of men who never had a legal residence in the city or ward, and who by reason of their military occupation could not acquire such a residence.

These views bring the Court to the conclusion that the petition must be dismissed with costs, *and it is accordingly so ordered.*

MR. JUSTICE OLIN, dissenting, said:

The decision of the Board of Registration upon the right of a party to vote is conclusive, unless it were fraudulently made, and then, of course, it will be void. But in this case, there is no charge of fraud, and the action of the registers being thus admitted to be in good faith is conclusive. I believe that the board erred in their view of what constituted residence under the law; but the error was an honest one, and if it could be received at all it could be only by *certiorari* or writ of error, and it is not pretended that appeals in that form are provided for.

The law provides that the board shall ascertain who are voters, and the board did so in this case. If any one doubts

the qualification of a party who asks to be registered, he is free to appear before the board and to contest his right, and the board are authorized to adjudicate the matter. In my opinion a proper construction of the force and effect of the registration act must lead to the conclusion that the board of judges is endowed with judicial power. The authorities abundantly sustain this view. It is the plain doctrine of the law, that where a duty is imposed by statute upon an officer, and he is required to decide a question, even though he is not empowered to call witnesses, yet his decision is a judicial determination. The decision made in this case by the board is as conclusive as if this Court had been made a board of registration. The decision of such a board cannot be inquired into unless there be a charge of fraud. It has been said that only the proceedings of courts of record are to be held thus sacred; but the doctrine applies not only to courts of record but even to justices of the peace whenever they are invested with plenary powers over the subject-matter on which they act. There is no doubt that so far as the right of the voter to cast his ballot is concerned, all parties are concluded by the determination of the board of registration.

What is the duty of the register? It is plainly settled by the law. Upon receiving the returns of the commissioners of election the law directs him to issue the notice or certificate to the person whom those returns show to be elected. Instead of doing that in this case, he gives his opinion that the person shown by the certificate to be elected is not entitled to vote and thus undertakes to constitute himself just such a court as my brethren are holding; he writes certificates and affidavits, and gravely comes to the conclusion that Carrol should be elected and not Mead.

This is a very gross error. The law plainly provides that he shall look only at the return of these commissioners of election; and from them, ascertaining who was elected, send notice to the party thus elected. The law expressly con-

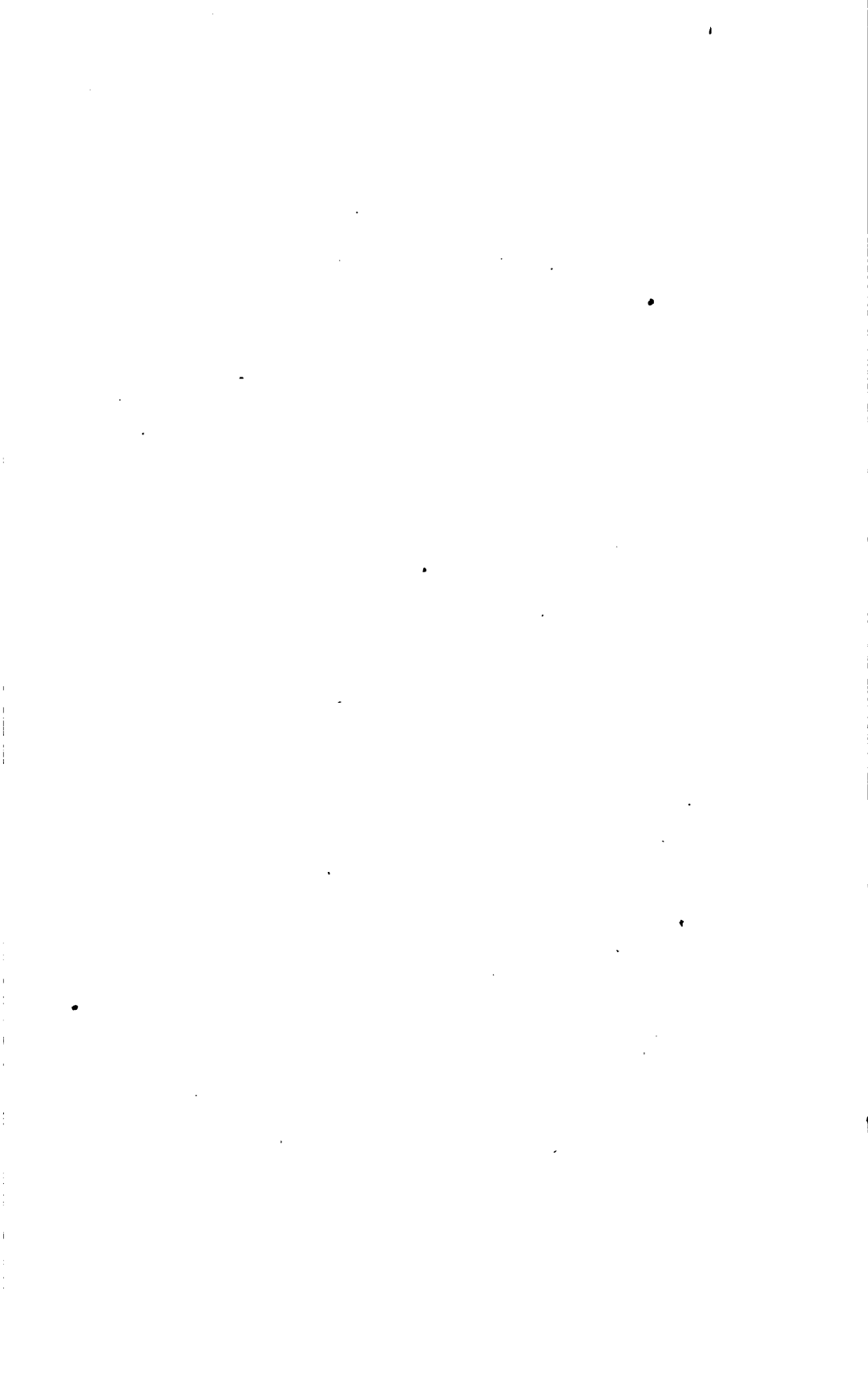
fines him to the evidence presented by the commissioners' return.

The affidavits of the separate commissioners are not to be taken into account at all; the commissioners could only act jointly. Their separate affidavits are entitled to no consideration, much less to be considered as amended returns. They had already declared in their certificate that Meade was elected, and there their powers ended.

As to the question of residence, I understand the law to mean simply this: that where a man comes into this District with the intention of making this his home or residence and in pursuance of that intention remains here a year, he is then a qualified voter. On the contrary, if he comes here for a merely temporary purpose, as the clerks do in the Departments, to fulfill official duties, although he may remain here for years, he never becomes a citizen. The board of registration seem to think that the meaning of the word "residence" is remaining here, residing or staying here; but that is not the meaning of the law at all. A man may stay here for years without intending to become a citizen, and he never becomes a voter. Many of the clerks in the Departments have not changed their residence at all, but return annually, to cast their votes at their actual places of residence, and are relieved from the Departments for this purpose.

I feel compelled to express my extreme disapproval of the marking of ballots in this case. I think it a grave and gross outrage. The distinguishing feature of a vote by ballot is its secrecy. This is laid down by every writer on elections. It has been held over and over again that an elector can not be called on to say for whom he voted, and every shield which the law can throw around the secrecy of the ballot has been placed around it. Remove the secrecy and the vote by ballot is practically abolished.





## APPENDIX.

---

*Containing such heretofore unpublished opinions of the late Circuit Court of the District of Columbia, as have been cited in the cases reported in this volume.*



## THE UNITED STATES

*vs.*

## THE "TROPIC WIND" AND CARGO.

1. While Congress alone has power under the Constitution to declare war, grant letters of marque, &c., the President may lawfully proclaim a blockade of any of the ports of the United States when in his judgment the exigency for such action has arisen.
2. A blockade of the ports of Virginia having been proclaimed by the President April 27th, 1861, and the same having been declared effective on the 30th of the same month, a vessel captured violating such blockade after notice becomes lawful prize of war.
3. Notice of a blockade may be actual or constructive.
4. A blockade is violated by egress as well as ingress of the blockaded port by a neutral vessel with a cargo loaded after notice of the blockade, and if captured, the cargo as well as the vessel becomes lawful prize of war.

In Admiralty. June Term, 1861.

LIBEL in admiralty to condemn as prize a vessel and cargo captured violating a blockade.

MR. CARRINGTON for libellant.

MR. CARLISLE for the vessel and cargo.

MR. JUSTICE DUNLOP delivered the opinion of the Court:

A libel has been filed by the United States, and the captors, in this Court, sitting in admiralty, to condemn as prize, the English Schooner "Tropic Wind" and cargo, valued at \$22,000, for violating a blockade of the ports of Virginia, proclaimed by the President of the United States on the 27th April, 1861.

The capture was made in or near the mouth of James River by the United States ship "Monticello," Captain ———, on the 21st May, 1861. The blockade of the port of Richmond, Virginia, into which port the "Tropic Wind"

had entered, before the proclamation is alleged to have been made effective on the 30th April and notice of it brought home to the captain of the "Tropic Wind" and the British consul at Richmond at least as early as the 2d of May. Fifteen days from the 30th April, which was the first day of the effective blockade, were allowed by the United States to neutral vessels to leave the blockaded port of Richmond.

It appears that the "Tropic Wind" commenced to load her cargo at Richmond, Virginia, on the 13th of May, completed her loading on the 14th May, and sailed from Richmond the same day bound for Halifax, Nova Scotia.

Mr. Carlisle appeared for the vessel and cargo, filed the answer of Captain Layton, and the case has been argued and submitted to me on the libel, answer, evidence taken in *preparitorio* and official documents.

The authority of the President to institute the blockade is denied by the respondents, who insist that this power, under the Constitution of the United States, can only be exercised by the National Legislature, and this is the first question to be considered.

It is true no department of the Federal Government can exercise any powers not expressly conferred on it by the Constitution of the United States, or necessary to give effect to granted powers; all others are reserved to the States respectively or to the people. In the second article of the second section of the Constitution of the United States, is this provision: "The President shall be Commander-in-Chief of the army and navy of the United States and of the militia of the several States when called into the actual service of the United States."

In the war with Mexico, declared by Congress to exist by the act of Mexico (see 9th Statutes at Large, p. 9), the Supreme Court have maintained in two cases, that the President, without any act of Congress, as Commander-in-Chief of the army and navy, could exert the belligerent right of levying contributions on the enemy to annoy and weaken

him. In the case of *Fleming et al. vs. Page*, 9th Howard, 615, the present Chief Justice says: "As commander-in-chief he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harrass and conquer and subdue the enemy." Again, at page 616: "The person who acted in the character of collector in this instance, acted as such under the authority of the military commander and in obedience to his orders and the duties he exacted, and the regulations he adopted were not those prescribed by law, but by the President in his character of commander-in-chief. The custom house was established in an enemy's country, as one of the weapons of war. It was established, not for the purpose of giving the people of Tamaulipas the benefits of commerce with the United States or with other countries, but as a measure of hostility, and as a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and the burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than contributions levied upon the enemy, which the usages of war justify when an army is operating in the enemy's country."

The other case to which I allude is *Cross et al. vs. Harrison*, 16th Howard, 189, 190. Judge Wayne in delivering the opinion of the Supreme Court says, "Indeed from the letter of the then Secretary of State and from that of the Secretary of the Treasury, we cannot doubt, that the action of the Military Governor of California was recognized as allowable and lawful by Mr. Polk and his Cabinet. We think it was a rightful and correct recognition under all the circumstances, and when we say rightful we mean, that it was constitutional, although Congress had not passed an act to extend collection of tonnage and import duties to the ports of California. California or the port of San Francisco

had been conquered by the arms of the United States as early as 1846. Shortly afterward, the United States had military possession of all of Upper California. Early in 1847 the President as Constitutional Commander-in-Chief of the Army and Navy, authorized the military and naval commanders of our forces in California, to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as *military contributions*, for the support of the Government and of the Army, which had the conquest in possession, &c. No one can doubt that these orders of the President and the action of our Army and Navy Commanders in California, in conformity with them, was according to the law of arms,"

Blockade is a belligerent right under the law of nations where war exists and is as clearly defined as the belligerent right to levy contributions in the enemy's country. As the Supreme Court hold the latter power to be constitutionally in the President without an Act of Congress, as Commander-in-Chief of the Army and Navy, it follows necessarily that the power of blockade also resides with him—indeed it would seem a clearer right if possible, because, as Chief of the Navy, nobody can doubt the right of its commander to order a fleet or a ship to capture an enemy's vessel at sea, or to bombard a fortress on shore, and it is only another mode of assault and injury to the same enemy to shut up his harbors and close his trade by the same ship or fleet. The same weapons are used. The commander only varies the mode of attack.

In the 1st article, section 8, clause 11, of the Constitution under the legislative head, power is granted to Congress to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

These powers are, therefore, solely confided to and within the control of the Legislature and cannot be exercised by the President. The President cannot declare war, grant

letters of marque, &c., though all other belligerent rights arising out of a state of war, are vested in him as Commander-in-Chief of the Army and Navy. But war declared by Congress is not the only war within the contemplation of the Constitution. In clause 15, article 1, section 8, among the legislative powers is this, "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections and repel invasions," and the Legislature in execution of this power passed the act of 1795 (1st Stat. at Large, 424), vesting in the President, under the terms set forth in the statute, discretionary power over the militia, in the cases enumerated in this 15th clause of sec. 8, article 1. The status of foreign nations, whose provinces or dependencies are in revolution, foreign invasion of our own country and insurrection at home, are political questions determinable by the Executive branch of our Government. On this subject, in the case of *The Santissima Trinidad*, 7th Wheaton, 305, it is said:

"This Court has repeatedly decided, that it will not undertake to determine who are sovereign States, but will leave that question to be settled by the other Departments who are charged with the external affairs of the country and the relations of peace and war. It may, however, be said that both the Judiciary and the Executive have concurred in affirming the sovereignty of the Spanish colonies now in revolt against the mother country. But the obvious answer to this objection is that the Court following the Executive Department have merely declared the notorious fact that a civil war exists between Spain and her American provinces, and this so far from affirming is a denial of the sovereignty of the latter. It would be a public and not a civil war if they were sovereign States. The very object of the contest is to decide whether they shall be sovereign and independent or not. All that the Court has affirmed is, that the existence of this civil war gave to both parties all the rights of war against each other."



In cases of invasion by a foreign power or insurrection at home, in which cases under the act of 1795 the President may call out the militia, the Supreme Court in 12 Wheaton (case of *Martin vs. Mott*), page 29, 30, say it is exclusively with the President to decide whether the exigencies provided for have arisen. These also are political questions determinable by the Executive alone, and the Courts follow that branch of the Government. In this case at page 32 the Supreme Court say: "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself." Whether insurrection has grown to such a head, has become so formidable as to have culminated in civil war, it seems to me must also belong as to its decision to the same political branch of the Government. The President in his proclamations relating to the blockade of the ports of the Confederate States calling out seventy-five thousand militia to suppress insurrection and the resistance to the Federal laws, alleges "that nine States have so resisted and have threatened to issue letters of marque to authorize the bearers thereof to commit assaults against the vessels, property and lives of citizens engaged in commerce on the high seas and in the waters of the United States; that public property of the United States has been seized, the collection of the revenue obstructed, and duly commissioned officers of the United States while engaged in executing the orders of their superiors have been arrested and held in custody as prisoners or have been impeded in the discharge of their official duties without due legal process by persons claiming to act under authorities of the State of Virginia and North Carolina. An efficient blockade of the parts of those States will also be established."

These facts so set forth by the President with the asser-

tion of the right of blockade, amount to a declaration that civil war exists.

Blockade itself is a belligerent right and can only legally have place in a state of war, and the notorious fact that immense armies in our immediate view are in hostile array against each other in the Federal and Confederate States, the latter having organized a government, and elected officers to administer it, attest the executive declaration that civil war exists—a sad war—which if it must go on, can only be governed by the laws of war, and its evils mitigated by the principles of clemency engrafted upon the war code, by the civilization of modern times.

Nor does the assertion of the right in the proclamation of the 19th April, 1861, to proceed against privateersmen under the laws of the United States as pirates, militate against the construction I have above given of the two proclamations, as averring the existence of civil war.

In the case of *Rose vs. Himely*, 4th Cranch, 272-3, Ch. J. Marshall in delivering the opinion of the Court, says: "It is not intended to say that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign, who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If, as a legislator, he publishes a law ordaining punishments for certain offenses, which law is to be applied by courts, the nature of the law and the proceedings under it, will decide whether it is an exercise of belligerent rights, or exclusively of his sovereign powers; and whether the Court in applying this law to particular cases, acts as a prize court or as a court enforcing municipal regulations."

In this case I am sitting in admiralty, adjudging a question of prize under a capture for alleged violation of blockade.

I do not find, on examination of the writers on public

law, any difference as to belligerent rights in civil or foreign war, and Judge Story, in 7th Wheaton, as heretofore cited by me, says they are the same.

Blockade being one of these rights, incident to a state of war, and the President having, in substance, asserted civil war to exist, I am of opinion the blockade was lawfully proclaimed by the Executive.

The next enquiry is, when did the blockade become effective, and as such come to the knowledge of the respondents or their Government. Notice, actual or constructive, will do. In the present case, Flag Officer Pendergrast, commanding Home Squadron, officially announced the blockade of the ports of Virginia, whose outlet was Hampton Roads, as effective on the 30th April, 1861, and the Secretary of the Navy in his letter of the 9th May, 1861, states this notice was sent to the Baltimore and Norfolk papers, and by one or more of them published. In a certificate of the British consul at Richmond, dated 14th May, 1861, found on board the "Tropic Wind," at the time of her capture, he states he had received an authoritative communication on the 11th May, which he immediately communicated to the captains of British merchant vessels, and others interested in British trade, that fifteen days would be allowed to leave port after the actual commencement of the blockade, with or without cargoes, "*and whether the cargoes were shipped before or after the commencement of the blockade,*" and that upon inquiry he found the 2d May, 1861, to be the day when the efficient blockade began.

There does not appear in the cause any evidence to show that the United States Government agreed to relax the law of blockade, so as to allow British vessels to load cargoes and come out of port, after knowledge of effective blockade was brought home to them. The letter of Mr. Welles to Mr. Seward, of date 9th of May, 1861, in answer to inquiries of Lord Lyons, relative to British vessels in Virginia

ports, and the operation of the blockade upon them, &c., and which it must be presumed was sent to Lord Lyons, does not contain the relaxation of the law of blockade referred to in the British consul's certificate of the 14th May, 1861, by which I mean that it contains no permission to British vessels to come out of port within the fifteen days, with cargoes laden on board, after notice of commencement of effective blockade. I give an extract from that letter of the 9th of May, 1861: "Fifteen days have been specified as a limit for neutrals to leave the ports after actual blockade has commenced, with or without cargo, and there are yet remaining five or six days for neutrals to leave; with proper diligence on the part of persons interested, I see no reason for exemption to any."

It also appears in the evidence of the master, Layton, that he heard in Richmond of the blockade as effective before he began to load his cargo, and was informed it commenced on the 2d May.

All the testimony concurs in showing the cargo was laden on board the "Tropic Wind" on the 13th and 14th days of May, 1861.

No principle of prize law seems better settled than that such lading violates the blockade and forfeits both vessel and cargo. In Wildman on Search, Capture and Prize, page 42, it is said: "The act of egress is as culpable as the act of ingress; and a blockade is just as much violated by a ship passing outwards as inwards. A blockade is intended to suspend the entire commerce of the place, and a neutral is no more at liberty to assist the traffic of exportation, than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken in a cargo before the blockade begins, she may be at liberty to retire with it. If she afterwards takes on board a cargo, it is a fraudulent act and a violation of the blockade. It is lawful for a ship to withdraw from a blockaded port in ballast, or with a cargo shipped *bona fide* before notice of the blockade," (see

also the *Judith*, Robinson, 150. The *Juno*, 2d Robinson, 119. The *Nossa Sentiora*, 5th Robinson, 52.)

In Wildman's *International Law*, vol. 2d page 205, we find this passage "Where the blockade is known at the port of shipment, the master becomes an agent for the cargo; in such case, the owners must at all events answer to the country imposing the blockade for the acts of persons employed by them; otherwise by sacrificing the ship, there would be a ready escape for the cargo, for the benefit of which the fraud was intended." (See also *The Jas. Cook*, Edwards, 261; *The Arthur*, Edwards, 202; *The Exchange*, Edwards 40; 1st Kent's *Commentaries* (2d Edition) 144-146; *Olivera vs. Union Insurance Company*, 3d Wheaton, 194—see also the reporter's note to the same case. It follows, upon the case, as it now stands, there must be condemnation of both vessel and cargo.

SAMUEL C. BARNEY

vs.

J. W. DEKRAFT.

- 
1. A personal judgement or decree obtained in any State of the Union over a non-resident who has not been served with process within the State, or who has not voluntarily appeared and subjected himself to the jurisdiction of the Court, has no extra territorial validity, and does not come within the operation of the fourth article of the Constitution declaring the effect within one State of judicial proceedings had within another; this rule includes decrees of divorce.
  2. The Orphans' Court has no jurisdiction to inquire whether a father be a fit person to be intrusted with the personal custody and education of his children; its jurisdiction as to him extends only to the due care and management of the infants estate.
  3. Where, for any reason, a father becomes incompetent or unfit to act as the natural guardian of his children, the remedy is in a Court of Chancery.

Decided June 12th, 1882.

APPEAL from an order of the Orphans' Court refusing to grant letters of guardianship to a father.

MR. WALTER D. DAVIDGE, for appellant.

MR. RICHARD S. COXE, for appellee.

MERRICK, J., delivered the opinion of the Court:

The present appeal has its origin in one of those conditions of family embroilment, always painful and distressing, which rarely come to the notice of courts of justice, and which still more rarely are investigated by courts with either moral or material advantage to the parties involved. The legal aspect which the present controversy assumes will relieve this tribunal from a critical balance of the criminations and recriminations with which the record

abounds. Simple justice requires of us, however, to observe that the most flagrant charge against the appellant is utterly unsupported and unwarranted by the evidence which has been adduced in that behalf.

The appellee as *prochien ami* and near relative filed his petition against the appellant in the Orphans' Court praying that tribunal to refuse to the appellant the guardianship of the persons and estates of the appellant's four children, alleging that he was an unfit and improper person for the office and charging that he had been divorced from his wife, Mary DeKraft Barney, now deceased, by a decree of the District Court of Jasper County, in the State of Iowa, and that by that decree the appellant had been deprived of the custody of his children and that his moral obliquity also was therein fully adjudged. The appellee made sundry specific charges in addition and offered to sustain them by proof. The cause was heard and proofs taken at great length before the Orphans' Court. That Court finally adjudged that inasmuch as the Court of Iowa had divorced the wife from the appellant and had decreed his acts, conduct and character to have been such as to render him unfit to have the custody of the minor children of the marriage, and had committed their custody to the mother, the appellant was conclusively bound by that decree, and while unreversed it furnished an answer to his claim for the custody of persons and estate of his children. The Court also determined that the claim of guardianship of the father ought to be controlled by the fact that the estate of the children was derived under the will of the late Edward DeKraft, the maternal grandfather of the children and he had by his will declared that his estate should be held by trustees in trust for his daughter and her heirs free from the control or disposal of any husband she might have and exempt from his debts, contracts or engagements. In both of these conclusions we think there was error in the decision of the Orphans' Court.

It appears from the record that the appellant was married to his late wife in the District of Columbia in 1847, and continued to reside here for many years; that some years prior to her decease they went to Paris, in France, and there sojourned, he being all the while a lieutenant in the navy of the United States; and that private difficulties having arisen between them, proceedings were instituted in a French tribunal which decreed temporary custody of the children and a temporary separation of the parties with leave to the wife to come to America to prosecute a petition for divorce. In the spring of 1860 Mrs. Barney came to the United States unattended by her husband, and proceeding to the State of Iowa, where neither she nor her husband had ever resided, she there filed in the District Court of Jasper County, her petition for divorce, caused publication to be made against her husband as an absent defendant, and procured a decree of divorce against him by default in September following, containing the allegations and determinations above referred to and which are now relied upon as irrefragably conclusive against the appellant not only as touching the marital relation, but also of the facts and charges recited as the basis of the decree, and of the parental rights of the father over his children.

What might or might not be the effect within the State of Iowa of an *ex parte* decree of divorce obtained as was the present, and whether all the statutory requirements of the law of Iowa were complied with so as to vest the District Court of Jasper County with a jurisdiction entitled to consideration within the territorial limits of that State we need not here enquire, it being conclusively settled by the Supreme Court of the United States in repeated adjudications that a personal judgment or decree obtained in any State of the Union over a non-resident who has not been served with process within the State, or who has not voluntarily appeared and subjected himself to the jurisdiction of the



Court, has no extra territorial validity, and does not come within the operation of the fourth article of the Constitution declaring the effect within one State of judicial proceedings had in another State. Among other authorities see *Shelton vs. Tiffin*, 6th Howard, 143; *Boswells Lessee vs. Otis*, 9th H., 336; *Landes vs. Brandt*, 10th H., 348; *D'Arcy vs. Kitchen*, 11 H., 165, and *Webster vs. Reid*, 11th H., 437. And that a case of divorce is embraced within the principle, see 12th Barbour, 640 and 28 Barbour 23.

Controlled by these authorities, as well as by the dictates of manifest justice, we are of opinion that the record of the Court in Iowa was not admissible evidence for any purpose against the appellant in the present controversy.

The provisions of the will of Edward DeKraft, which were relied upon as the second ground of exclusion, when examined, have no relation to the question of guardianship; indeed it cannot be deduced from the terms of the instrument that the matter of guardianship was at all in the mind of the testator. The provisions of the will are directed solely to the exclusion of any husband from that absolute right of property which the marriage confers over all the personal property of the wife, and from the usufruct for life of the real estate, with all its rents and profits. The terms of this will debar him from these during the marriage, and also from his right of survivorship and curtesy; according to the doctrine of the cases of *Marshall and Beall*, 6 Howard, 70, and *Ward et ux. vs. Thompson*, 6 Gill and Johnson, 349; but the strict terms of this settlement no more militate against the right of guardianship of the surviving husband than would the terms of a deed in fee simple from a total stranger to the children for a house and lot in this city.

The foregoing considerations dispose of the grounds of judgment relied upon by the Court below, but as the act of assembly requires this Court on appeal to go further (see

18th section of sub. ch. 15 of act of 1798) the question remains whether upon the testimony of the living witnesses produced by the petitioner the Court below was authorized to refuse to accept from the appellant a sufficient bond if tendered under the statute as natural guardian to his infant children. In other words, has the Orphans' Court jurisdiction to inquire into the character and conduct of a father to exclude him from the care and custody of his infant children and to commit their persons as well as estates to a stranger. The power is an inquisitorial power of a most delicate and difficult sort which must inevitably in its exercise bring to light numerous family differences, family difficulties, and family misfortunes which it were better for the honor of humanity to cover with the thickest veil of charitable silence. For such investigations the machinery of courts of justice is ill-adapted, especially the Orphans' Courts, whose interference with parental discipline could rarely be exerted usefully. The vice-chancellor, in 2d DeGex & Smale, p. 474, says: "The acknowledged right of a father with respect to the custody and guardianship of his infant children are conferred by the law, it may be with a view to the performance by him of duties towards the children; and in a sense, on condition of performing those duties, but there is great difficulty in closely defining them. It is substantially impossible to ascertain or watch over their full performance, nor could a court of justice usefully attempt it. A man may be in narrow circumstances; he may be negligent, injudicious, and faulty as the father of minors; he may be a person from whom the discreet, the intelligent, and the well-disposed, exercising a private judgment would wish his children to be for their sakes and his own removed; he may be all this without rendering himself liable to judicial interference, and in the main for obvious reasons, it is well that it should be so." Such being the nature of the power claimed and such being

some of the objections to its exercise, it must be apparent to every one (independently of the injunctions of the act of 1798, "that the Orphans' Courts shall not under pretext of incidental powers, or constructive authority, exercise any jurisdiction whatever not expressly given"); that its possession by that tribunal should be denied unless beyond all reasonable doubt the terms of the law vest it or the spirit of the law require it to be comprehended in certain language which seem broad enough to include it.

Prior to the act of 1777, Ch. 8, the courts of the commissary-general and his deputies had jurisdiction only in testamentary affairs, the exclusive cognizance of matters of guardianship being confided to the county courts who were authorized only to appoint guardians to infant orphans' • who had no natural guardian. The county courts supervise the management of their estates, and had it in charge by the act of 1715, Ch. 39, Secs. 21 and 22, annually to inquire by a jury "whether the orphans be kept, maintained and educated according to their estates," and to remove their guardians upon default found by the jury. This jurisdiction was for the first time transferred to the Orphans' Court by the act of 1777, Ch. 8. Before that statute the ordinary never exercised either under the laws of England or the laws of Maryland any jurisdiction in the matter of the appointment or removal of guardians. See McPherson on Infancy, p. 74; 4th Burrows, 1436; 3d Cranch C. C., p. 156. Upon the revision of our testamentary system by the act of 1798, the orphans' jury was abolished and in lieu of its functions the Orphans Court was authorized by the 12th section of sub-chapter 15, upon an application suggesting improper conduct in any guardian whatever, either in relation to the care and management of the property or person of any infant to inquire into the same, and at their discretion remove such guardian and make choice of another who shall receive the property and custody of the said ward.

It would scarcely occur to any one who will advert to the history of the orphans' jury and there read the language I have quoted, that the legislature had in contemplation when using the words "any guardian whatever" to confer upon the Orphans' Court the jurisdiction to enter every family in the land upon suggestion from a child or some person on his behalf, investigate its private history and discipline, drag all its painful memories before the public attention and record private shames and private griefs to the scandal of future as well as the present generation, and yet such is the result of the argument in the case, for it is said that the father is the natural guardian of his children, and as the statute says "any guardian whatever," a natural guardian is included in the expression. This argument has its vice in an inversion of the force of language. The aspect in which the father is viewed by the law is that of parent and not of guardian; the latter is the subordinate, the former the paramount relation; the less to be controlled by the greater and not the greater curtailed by the less.

In the language of Blackstone the relation of guardian is *derived out* of that of parent, the guardian being only a temporary parent. Indeed the loose manner in which the term *natural guardian* is used has given rise to much perplexity in the law books and confusion in drafting and interpreting statutes. Its original and proper significancy and energy arose out of the conflict between the claims of tenure and of parental right in the matter of lands held under the fuedal tenure of knight's service or in chivalry. In that case the right to the custody of the person of the infant heir belonged to the father in exclusion of the *lord* in chivalry, who nevertheless retained the wardship of the lands, and was entitled also to the custody of the person as against mother, grandfather and every other relative except the father, whose paramount parental right was acknowledged by the fuedal lawyers under the scholastic designation

of guardian by nature. It is the character of *parent* which the law has in view, and its sacredness at the common law is admirably illustrated in this its triumph over the iron exigency of military tenure. Whenever, therefore, our statutes use the term guardian, the father although in one sense the natural guardian, is never to be included, unless there be something more which imperatively demands that he should be embraced by the expression. But it is said that the father is to be embraced by the language of the section, because by the 3d section of sub-chap. 12, in case an infant become entitled by descent or devise to land or to a legacy or distributive share, his natural guardian may be called upon to give bond for the performance of his trust, and upon his neglect or refusal the Court may appoint another guardian. Does it follow from this section that if a father be poor and by any of the contingencies enumerated his child should receive a large portion for which he could find no one willing to go his surety, that therefore the Court shall deprive him of the care and custody, the training, education and social consolation of his child, and confide not only the estate but the person of his child to some wealthier or better known stranger, and yet this conclusion must be reached before the interpretation claimed can be given to the 12th section of sub-ch. 15.

It must be obvious that the other guardian contemplated by the 3d section is a guardian of the *estate only* and not of the person. Repeated adjudications in England has established that a father cannot be deprived of the custody of his child by a devise or legacy accompanied by the designation of guardian, and what is there held to be repugnant to natural right we must not impute to the legislation in the construction of a statute admitting a different meaning.

Chancellor Kent says (2 Commentaries, p. 221, note c), "Attempts have been made to control the father's right to

the custody of his infant children by a legacy given by a stranger to an infant, and the appointment by him of a guardian in consequence thereof. But it is settled that a legacy or gift to a child confers no right to control the father's care of the child, and no person can defeat the father's right of guardianship by such means." In the case of *Vanartsdalen vs. Boyer*, 14 Pa., 385, the Court, on appeal from the Orphans' Court, held that a devise by a grandfather of lands, &c., to grandchildren, containing the clause, "my executors hereinafter named to be guardians for the children of my said daughter during their minority, and I do hereby nominate and appoint them for that purpose," meant merely a devise of the guardianship of the property, but was not intended to interfere with the natural right of the father to the custody and care of his children. Upon these considerations the sound rule of construction would seem to be to limit the power of substitution to the trust, which the legislature for the first time subjected to the jurisdiction of the Orphans' Court by the 3d section of sub. chap. 12, to wit, the security and control of the infants' estate; and that being the case, when we apply the provisions of sec. 12 of sub. ch. 15, we should in like manner limit the terms to the subject matter, to wit, the conduct of the father in the management of the property of his child. The case of *Fridge vs. The State*, 3 Gill and Johnson, p. 113, is relied upon as adjudicating this question. Upon looking at the case it will be found that the present inquiry was not by the remotest hint brought to the mind of the Court. The point before the Court there was whether, it being shown in a suit upon a guardian's bond collaterally that the mother as natural guardian, was living at the time of appointment, that fact did not of itself show that the Orphans' Court transcended its jurisdiction in appointing a third person guardian. And in meeting that objection the Court of Appeals said, "Unless the natural guar-

dian had failed or neglected to give bond for the performance of her trust on being called upon to do so, in pursuance of the 3d section of the 12th sub. chap., or had been removed for cause under the provisions of the 12th sec. of sub. chap. 15, it would not have been the case of an erroneous judgment," &c.

This chance expression in the course of a judicial opinion is relied upon as settling the claim of jurisdiction to the extent insisted on by the appellee. The case before the Court of Appeals was a case purely involving the estate of the infant and not relating to his custody, and the Court in speaking of "*the removal for cause*" does not say for *what* cause, nor what shall be the *extent* of the removal, and the language is perfectly consistent with the idea that the *cause* for which the natural guardian shall be removed must be some misconduct or dereliction touching the estate, and that the removal so to be made is a removal from the control of the estate. Nor do I think the concluding words of the section give any additional force to the claim, for as I have endeavored to show from the 3d section the statute contemplates a separation of the custody of the person and the estate in certain contingencies, and when we come to construe this 12th section, we must adopt the plain rule of rendering consequents according to their antecedents, giving in those cases, where the property and person have both come under the control of the Court, the right to transfer both, and where the property alone has come under its dominion, the right to transfer the property only. The foregoing limitation of the power of the Orphans' Court is necessary to harmonize the act of 1798 with the Act of Congress of February 20th, 1846, 9th Statutes, p. 4, ch. 8, sec. 1. By its provisions, when an infant whose father is living shall by gift or otherwise become entitled to property separate from the father, the Court may compel him to give bond to account for it as other guardians, and if he fail or refuse the Court "shall

have power to appoint a *special guardian* to take charge of said property, who shall give bond and security as in other cases, but with condition to *suit the case*." Here we have a legislative declaration that the separate *property* of the infant shall upon the father's default be given in charge to a *special guardian*.

Now what reason can be shown why an infant having property by *gift* should be left to the personal control of his father while he who has a *legacy* or distributive share in the discretion of the Orphans' Court be committed to the charge of another. For the foregoing reasons we think the Orphans' Court precluded from inquiring whether a father be a fit person to be entrusted with the personal custody and education of his children, and that its jurisdiction as to *him* extends only to the due care and management of the infant's estate. It does not appear in this case that the father was permitted to tender a good and sufficient bond for the management of his children's property, nor is there anything in the testimony to show him to be incompetent for *that* task. We think him entitled to that privilege for aught disclosed upon this record.

"Should it appear that it is in some very material and important respects essential to the well being and welfare of children either physically, intellectually or morally that the rights of a father should be suspended, superseded or interfered with, the chancery jurisdiction is ample to afford remedy." (Curtis vs. Curtis, 5 Jurist U. S., p. 1148.) In a proper case that tribunal may always be invoked and the interests of society protected without resorting to dangerous rules of construing statutory grants.

It is therefore ordered that the decree of the Orphans' Court rejecting the application of the appellant to be permitted to give bond for the performance of his trust as natural guardian of the estate of his infant children, Samuel C. Barney, jr., Edward D. Barney, Hite G. Barney, and



Clayonia Barney, and that appointing Doctor Harvey Lindsley guardian of the said infants, be reversed and said letters of guardianship issued to said Lindsley are hereby annulled, and this cause is remanded to the Orphans' Court, with directions to cite the said Samuel C. Barney for the purpose of entering into bond with good and sufficient security, to be determined by said court, for the execution of his trust as aforesaid, and upon his neglect or refusal so to do, within a reasonable time to be fixed by said court, then in its discretion to appoint some fit and proper person guardian to take care of and manage the property and estate of said infants in the manner provided by law; the costs of the proceedings in the case to be paid out of the estates of said infants.

# INDEX

---

ABATEMENT. See *Actions*, 2.

ACTIONS. See *Municipal Corporations*, 1, 2.

1. The right of action to recover damages for injuries to the person dies with the person. *Roche vs. Carroll*, 79.
2. The Maryland Act of 1785, chap. 80, sec. 1, providing that no action shall abate by the death of either party refers only to such actions as could have been revived at common law. *Id.*

ADMIRALTY.

1. By reason of its ordinance of secession and its joining the fortunes of the Confederate States, every inhabitant of the State of Virginia became, *ipso facto*, under the laws of war a public enemy of the United States, and his property enemy property, although he may have openly denounced the ordinance of secession and acknowledged his paramount allegiance to the United States. *United States vs. Sally Mears*, 36.
2. Two days before the passage of the ordinance of secession by the State of Virginia, a vessel cleared from Norfolk of that State for the Barbadoes. She was owned in Virginia, and her officers and crew were inhabitants of that State. On her return voyage she was destined for Baltimore, but was captured by a United States man-of-war twelve miles outside the capes of the Chesapeake. Her papers were regular, and she sailed under the United States flag. Her master, who was owner of one-eighth of the vessel, testified that he considered himself a "subject" of the United States; that he considered his allegiance to the Union as greater and stronger than the allegiance he owed to his native State, and that he would sustain the United States against his native State. *Held*, That the vessel at the time of her capture was enemy property in consequence of the residence of her owners in the enemy country. *Id.*
3. Where a vessel has been captured *jure belli* and not under the non-intercourse acts of Congress, and the vessel and cargo have been libelled as enemy property simply, and in that

**ADMIRALTY.** *Concluded.*

- character condemned, the case does not come under the provisions of the act of Congress intended to protect liens which might be established in the case of a seizure where one-half of the property seized goes to the informer, and the other half to the United States. *United States vs. The Hampton*, 75.
4. The act of Congress of March 3, 1863, providing for the protection of certain liens is incomprehensible and therefore incapable of enforcement by the Court. *Id.*
  5. While Congress alone has power under the Constitution to declare war, grant letters of marque, &c., the President may lawfully proclaim a blockade of any of the ports of the United States when in his judgment the exigency for such action has arisen. *United States vs. The Tropic Wind*, 351.
  6. A blockade of the ports of Virginia having been proclaimed by the President April 27th, 1861, and the same having been declared effective on the 30th of the same month, a vessel captured violating such blockade after notice becomes lawful prize of war. *Id.*
  7. Notice of a blockade may be actual or constructive. *Id.*
  8. A blockade is violated by egress as well as ingress of the blockaded port by a neutral vessel with a cargo loaded after notice of the blockade, and if captured, the cargo as well as the vessel becomes lawful prize of war. *Id.*

**AGENTS.** See *Principal and Agent*.

**ALIENS.** See *Citizenship*, 1, 2.

**APPEAL.**

1. On an appeal to the Supreme Court of the United States any of the justices of this Court may on application to them fix the penalty of the appeal bond and determine as to the sufficiency of the sureties, and neither the statute or the rules of the Supreme Court provide for a rehearing or a readjudication of the same matter, before any other justice of this Court. *Whitney vs. Frisbie*, 262.
2. After a final decree in this Court and appeal taken according to the statute and the practice of the Court, this Court loses all further jurisdiction of the cause and the parties, and can make no further order therein. *Id.*
3. Where the appeal bond is inadequate or the sureties are insufficient, the remedy would seem to be an application to the Supreme Court to dismiss the appeal on either or both of those grounds. *Id.*
4. An appeal does not lie to this Court from an order of the Crim-

APPEAL. *Concluded.*

- inal Court overruling a motion to quash an indictment. Such an order is interlocutory only. *United States vs. Huyck*, 304.
5. The Government has no right in a criminal case to an appeal or writ of error when judgment has been rendered in favor of the prisoner. *United States vs. Surratt*, 306.

ARREST. See *Crimes and Misdemeanors*, 4, 5.

ASSIGNMENT.

1. A deed of assignment by an insolvent which authorizes the trustee to make sale of the assigned property "whenever he shall think proper and conducive to the interest of the trust, is void as to creditors. *Hayes vs. Johnson*, 174.
2. So such a deed is void which requires a release from the creditors as a condition of their sharing in the proceeds of the assigned estate. *Id.*
3. It is also void where by its terms it provides that the trustee shall not be liable for any loss that may happen to the trust estate "unless the same be consequent upon his willful commission, omission or neglect," the effect of such a provision being to exempt the trustee for failing to exercise ordinary care, and it would seem to exempt him even for acts of gross negligence. *Id.*
4. The mere fact that one is unable to pay his debts at the time of obtaining a loan does not render the transaction fraudulent. *Aliter* if at the time of negotiating the loan he knew that he could not pay it, or did not intend to pay it. *Id.*
5. If an assignment be fraudulent, execution may be had by *fiere facias* without coming into equity to have the deed set aside. *Id.*
6. Where a suit is pending against a debtor and is approaching trial, another creditor has a legal right to protect himself by taking an assignment of such debtor's property as security for the payment of his debt, and it is no badge of fraud that the property assigned exceeds in amount the claim of the creditor, since other creditors may by paying the debt release the property, or may avail themselves by other modes of the equity of redemption; but the *bona fides* of such a transaction is always one of fact. *Birdsall vs. Welch*, 316.
7. If there have been good faith and a valuable consideration on the part of the purchaser the deed is valid, notwithstanding there may have been a fraudulent purpose on the part of the grantor to hinder and delay his creditors. *Id.*

BANKS. See *Contracts*, 1-3.

1. The liability of a banker who receives deposits of money, to pay

**BANKS. Concluded.**

out the same on the checks of the depositor is implied by law and does not require any special contract. *Thompson vs. Riggs*, 99.

2. The relation of a banker to his depositor is that of a debtor to a creditor and not that of a bailor, agent or trustee. *Id.*

**BLOCKADE.** See *Admiralty*, 5-8.

**BROKERS.** See *Contracts*, 4, 5.

**CERTIORARI.** See *Forcible Entry and Detainer*, 1-7.

**CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.**

Whether the late Circuit Court of the District of Columbia was one the class of Circuit Courts established by Congress under the judicial powers of the Constitution, or was a court erected under that provision which confers upon Congress the right of exclusive legislation over the District is a question discussed in this case but not determined. *In Re HALL*, 10.

**CITIZENSHIP.**

1. By the Act of Congress of February 10, 1855, an alien woman marrying a citizen of the United States becomes a citizen by virtue of her marriage. *Owen vs. Kelly*, 191.
2. The terms of the act apply to every woman of white blood, married at the time of its passage, or who should afterwards become married to a citizen of the United States. *Id.*

**CONSTITUTIONAL LAW.**

1. A purely legislative power cannot be delegated by Congress. *In Re Dugan*, 131.
2. The Act of March 3d, 1863, conferred no power upon the President to suspend the privilege of the writ of *habeas corpus*. He derives that power directly from the Constitution itself. *Id.*
3. The power to suspend this writ is not given to Congress; it rests, under the Constitution with the President alone. *Id.*
4. The ordinance of Georgetown of July 24, 1852, providing for the inspection of flour does not apply to such flour as is merely in transit through the city, as, for example, where it is shipped from a point in Maryland to the City of New York, and passes through Georgetown on its way to the point of destination. *Corporation of Georgetown vs. Davidson*, 278.
5. If the ordinance were intended to apply to such cases it would be unconstitutional as an attempt to regulate commerce between the States. *Id.*

CONSTITUTIONAL LAW. *Concluded.*

6. A personal judgment or decree obtained in any State of the Union over a non-resident who has not been served with process within the State, or who has not voluntarily appeared and subjected himself to the jurisdiction of the Court, has no extra territorial validity, and does not come within the operation of the fourth article of the Constitution declaring the effect within one State of judicial proceedings had within another; this rule includes decrees of divorce. *Barney vs. De Kraft*, 361.

CONTEMPT. See *Infants*, 1-3; *Crimes and Misdemeanors*, 3.CONTRACTS. See *Banks*, 1, 2; *Legal Tender*, 1-3.

1. Where there is a special contract, its terms define all the rights and liabilities of the parties, and evidence of custom or usage cannot be received to vary or affect those terms. *Thompson vs. Riggs*, 99.
2. So, where the liability of a party is fixed and clear under the law, evidence of usage is irrelevant since it can neither confirm, detract from, nor in any way effect such liability. *Id.*
3. Where the parties have agreed upon a particular place where a contract, the terms of which are doubtful, is to be performed, the usage of that place may be given in evidence for the purpose of interpreting the contract. *Id.*
4. Where the owner of property places it with a real estate broker for sale who accordingly advertises it, the latter is entitled to his commission if the purchaser derived his information through the broker that the property was for sale, although the negotiations were had with the owner and the purchase was made directly from him. *Kilbourne & Latta vs. King*, 310.
5. Where a contract is partly in point and partly in writing, and the written portion only is read over to the contracting party, and he then directs his signature to be placed to the paper, he is bound by the agreement although he neither read nor had read over to him, the printed matter, provided he had an opportunity to read it and it was not fraudulently concealed or withheld from him. *Id.*

COSTS. See *Practice (In Equity)* 5; *Trespass*, 2.CRIMES AND MISDEMEANORS. See *Forcible Entry and Detainer*, 7, 14.

1. This Court has jurisdiction of all crimes committed in this District known to the common law, or created by those English statutes in force in this country, or by the statutes of Maryland

CRIMES AND MISDEMEANORS. *Concluded.*

- in force at the time of the cession and not subsequently repealed, or created by act of Congress, which may be tried and punished according to the forms of proceeding known to the common law, that is, by presentment and indictment by a grand jury, and trial before the petit or traverse jury. *United States vs. Griffin*, 53.
2. The "crimes and offenses" referred to by the fifth section of the act of Congress of February 27th, 1801, are all crimes and offenses which are cognizable, that is, triable and punishable, according to the proceedings at common law. *Id.*
  3. A larceny having been committed beyond the limits of the District of Columbia, the stolen property was recovered by a private detective and brought into the District, whence four-fifths of it was sent to the owner, the remaining fifth was retained by the detective as compensation for his services; whereupon the superintendent of police, claiming to act under the authority of the act of Congress of July 23, 1866, demanded the delivery to him of the property so retained, and upon his refusal so to do imprisoned the detective for disobeying said order. *Held*, upon *habeas corpus*. (1) That the act of Congress was not applicable to such a case. (2) That the property having been both stolen and recovered beyond the District limits, the superintendent of police could take no cognizance of the matter, and even if he could his power to imprison for contempt a person not a member of the police force was limited (if such power existed at all) to a period not exceeding two days. *In Re Hotchkiss*, 168.
  4. It is no justification for a false arrest, without warrant, that the defendant acted upon the advice of a police officer. *Barth vs. Heider*, 312.
  5. Neither a private person nor an officer can arrest without a warrant a person charged with a crime of less degree than a felony, if the crime were not committed in their presence. *Id.*

CRIMINAL COURT. See *Appeal*, 4, 5.

DAMAGES. See *Actions*, 1, 2; *Municipal Corporation*, 1, 2; *Principal and Agent*.

DECREE. See *Constitutional Law*, 6.

DEED. See *Trusts*, 2; *Assignment*, 1-3.

## DIVORCE.

1. Before the passage of the Act of Congress of June 19, 1860, (Stats. at Large, V. 12, p. 59), no Court of this District possessed jurisdiction over the subject of divorce. *Hatfield vs. Hatfield*, 80.
2. Under the fifth section of said act, a divorce cannot be granted by the Courts of this District, when the grounds of it occurred while the parties were domiciled in, and subject to some other and foreign jurisdiction, unless the party applying has resided within this District for two years. This Court will, therefore, not assume jurisdiction to grant a divorce between parties, neither of whom is or ever was a resident of this District, simply because the adultery complained of was committed here. *Id.*
3. Up to the year 1860 no law existed in the District of Columbia authorizing a divorce from the bond of marriage for any cause whatever, although in a proper case the Court had power to decree a separation and alimony. *Cheever vs. Wilson*, 149.
4. A person's domicile is that place in which he has taken up his permanent residence, and to which, when he is absent from it, he has the intention of returning. *Id.*
5. A domicile once acquired is never lost until a new one is gained. *Id.*
6. During coverture the wife has no power to change her domicile, except where she has been abandoned by her husband, and he has taken up a new domicile for himself in another jurisdiction; in such case she may choose the old or follow him into his new domicile for the purpose of instituting a divorce suit. *Id.*
7. But beyond such choice she may not go. She will not be permitted to select that particular jurisdiction whose laws and whose administration of them, she may find best suited to her purpose and make that her domicile, into which she may compel her husband to come to answer her complaint. *Id.*
8. In a question of divorce there is no difference whether the decree has been pronounced by a judicial tribunal in a foreign country or by a court in one of the States of the Union; in either case the decree is valid if the Court had jurisdiction, and void if it had not. *Id.*
9. A divorce rendered in Indiana divorcing parties whose legal domicile is in this District is void for want of jurisdiction, although the defendant appeared and submitted to the jurisdiction of the Court. *Id.*
10. Such a divorce cannot be recognized in any proceeding in this Court which may be based upon it, even though all parties agree to recognize it as valid. *Id.*

DOMICILE. See *Divorce*, 5-7; *Elections*, 5-9.



ELECTIONS. See *Judicial Discretion*.

1. The Acts of Congress of January 8, and February 5, 1867, and the joint resolution of March 30 of that year, construed and the powers and the duties of the judges of election in making the registry of qualified voters defined. *U. S. ex rel. Langley vs. Bowen*, 197.
2. Where the time is fixed by statute for the hearing of applications to the board of judges of elections to add to or omit from the list of voters the names of particular persons, a petition to this Court for a writ of mandamus to compel the board to register the petitioner's name will be dismissed as premature when the board has not yet held its sessions for hearing such applications. *Id.*
3. The Commissioners of Elections are liable in damages to the aggrieved party if they refuse or suspend his vote on a mere vague and capricious challenge unsupported by reasonable proof; yet if such challenge be supported by evidence sufficient to engender an honest doubt in the minds of the commissioners, it would be the duty of the person tendering his vote to relieve that doubt by his own oath and such other proof as he could reasonably obtain. *Alden vs. Hinton*, 217.
4. The registry of the party's name and proof of his having paid the requisite taxes are not conclusive of his right to vote, but the commissioners may lawfully go behind the registry and tax receipt, and inquire as to his citizenship and residence if they honestly doubt either of these. *Id.*
5. Where on a return to an application for mandamus against the Board of Registers of Election to compel the striking of certain names from the list of voters, it appears that the board has fully exercised the judgment and discretion entrusted to it by the law in determining the qualifications of applicants, and that the board is satisfied that the persons registered are residents of the District, and it does not appear that any fraud or corruption was practiced by the board, the Court will not go behind the answer to take proof whether the persons registered were voters. *Arrison vs. Cook*, 335.
6. The board of judges of election created by the act of February 5, 1867, is not a judicial tribunal whose decision is final, but its acts are subject to the investigation and revision of this Court, who in a contested case may go behind the official return for the purpose of ascertaining who was really elected. *Mead vs. Carroll*, 338.
7. Soldiers of the United States army do not acquire or lose their citizenship by reason of being stationed in the line of duty at any particular place, no matter how long their occupancy of such place may continue. *Id.*

ELECTIONS. *Concluded.*

8. A person leaving temporarily and for a particular purpose his abode or fixed habitation, as for business, pleasure, or health, with the intent of returning to the same as soon as such purpose shall be accomplished, does not lose his residence or habitancy.
9. So, soldiers and seamen may be legal residents and inhabitants of a place; although they may have been absent therefrom for years, they do not lose their residence or domicile by following their profession. *Id.*

## EQUITY.

1. A Court of Equity will not aid any one in an attempt to enforce legal right, which he can only obtain by a violation of conscience. *May vs. Schofield*, 235.
2. A tax deed which was procured in pursuance of a fraudulent arrangement between the original owner and the tax deed holder to suffer the property to be sold for taxes in order to defeat the creditors of the owner, will be set aside as a cloud upon the title at the suit of a purchaser under a decree made in a creditor's suit. *Id.*

FIERI FACIAS. See *Assignment*, 5.FLOUR INSPECTION. See *Constitutional Law*, 4, 5.

## FORCIBLE ENTRY AND DETAINER.

1. On *Certiorari* to review a proceeding under the Statute of 8th Henry VI, ch. 9, for forcible entry and detainer, if the complaint and finding of the inquest show that the complainant held only a leasehold and the latter declare that the defendant "did disseise and expel" with strong hand, &c, such finding is incurably repugnant, for there can be no disseisen of a leasehold. *Adams vs. Horr*, 40.
2. So it is a fatal error if the record does not show that all the members of the inquest were sworn. *Id.*
3. And such swearing ought to be shown by a certificate of the justices and not be left to be certified by the members of the inquest. *Id.*
4. So, too, it will be fatal if the record does not show that the defendant was called, or had notice of the finding of the inquest that he might have the opportunity to tender his traverse. *Id.*
5. The course of procedure under the Statutes of Henry VI and James I, relating to forcible entry and detainer, pointed out and explained by the Court. *Id.*

FORCIBLE ENTRY AND DETAINER. *Concluded.*

6. At common law one having the right of entry upon lands could lawfully take and retain possession thereof by force provided he used no more force than was necessary to effect his purpose. *Adams vs. Horr et al.*, 45.
7. In a criminal proceeding under the acts of 5th and 15th Rich. II, for forcible entry and detainer the complaint must be in writing, under oath and must be certain as to the facts, circumstances and intent constituting the offense. If it be vague and uncertain in its description of the place, or fail to allege the expulsion of the complainant from the premises it will be quashed. *Id.*
8. At common law, he who without right entered upon the freehold and possession of another, "with force and arms and with a multitude of people," and expelled the rightful occupant or possessor, was guilty of a misdemeanor, and was liable to be indicted by a grand jury, tried by a petit jury, according to the forms of proceeding at common law, and sentenced to fine and imprisonment. *United States vs. Griffin*, 53.
9. The gist of this offense consisted in entering *without right*, for he who entered upon the possessions of another, and even expelled the actual occupant, if unaccompanied by an assault or battery of the person expelled, might have been guilty only of a simple trespass, and a simple trespass upon the freehold was not an indictable offense at common law. *Id.*
10. At common law, he who had the right of entry committed no indictable offense in taking that possession even if done with force and arms. *Id.*
11. The statute of 5th Richard II, which is in force in this District, changed the common law only so far as to make it an indictable offense, punishable according to the forms of proceeding at common law, to forcibly enter into lands and tenements with strong hand and multitude of people, even though the party entering had the right of possession at the time of his entry. *Id.*
12. The word "ransom" as used in the statute means not only a fine, but a severe fine. *Id.*
13. As the act mentions no court or tribunal as having jurisdiction or cognizance of the offense mentioned in it, it follows that every tribunal proceeding according to the course of the common law and having general jurisdiction for the trial of crimes and misdemeanors may take cognizance of the same when committed within its jurisdiction. *Id.*
14. Such an offense is, therefore, cognizable by this court upon an indictment charging it, and concluding, "against the form of the statute in such case," &c. *Id.*

**FRAUD.** See *Assignment; Practice (in Equity)*, 9, 10.

1. A debtor commits no fraud upon his existing creditors by conveying to a trustee for the benefit of his wife such of his property as is by law exempt from execution. *Cassin vs. Bozzle*, 280
2. A deed of trust of merchandise which professes to be made to secure a promissory note, but which permits the grantor to retain possession of the property and "to use and enjoy" the same until default be made in the payment of the note, is fraudulent and void as to creditors. *Selling vs. Kimmell*, 273.
3. To constitute a valid deed of trust of personal property to secure a debt it must look alone to that object. If it contain provisions intended to enable the maker of it to secure the use and enjoyment of the property for himself, and by means thereof plainly tends to defraud, hinder or delay other creditors, the deed is void, and it is the duty of the Court to decide this question for itself and not to leave it to the jury. *Id.*
4. Although under the statute of Elizabeth a *bona fide* purchaser without notice takes no title by his conveyance from a fraudulent grantee, yet the rule is different if his purchase be made directly from a fraudulent grantor. *Birdsall vs. Welch*, 316.
5. Where A, having a judgment for damages against B, levies execution upon personal property previously conveyed by way of chattel mortgage to C, on the ground that the deed of conveyance is fraudulent, and C replevies from the officer, a verdict and judgment in the replevin suit in favor of C settles the question of fraud and is conclusive evidence to establish the validity of the deed against A in a subsequent suit in equity attacking the same deed as fraudulent. *Id.*

**FUGITIVE SLAVE ACT.** See *Circuit Court of the District of Columbia*.

Whether the act of Congress of February, 1793, and its supplement, the act of 1850 (the "Fugitive Slave Act"), are in force in this District, *quære*—the Court being divided in opinion. *In Re Hall*, 10.

**GAMING DEBTS.** See *Promissory Notes*, 1-3.

**GEORGETOWN.** See *Constitutional Law*, 4, 5; *Ordinances*.

**HABEAS CORPUS.** See *Constitutional Law*, 2, 3.

**HUSBAND AND WIFE.** See *Divorce; Citizenship; Practice (At Law)*, 1; *Practice (In Equity)*, 7.

1. The earnings of the wife, and whatever has been purchased with it belong to the husband, and are liable for his debts. *Brown vs. Beckett*, 253.

**HUSBAND AND WIFE.** *Concluded.*

2. The relation of husband and wife cannot exist between slaves, although they live together as such, and children are born of their union; nor can their continued cohabitation after emancipation raise, as in other cases, a presumption of marriage. *Id.*
  3. Defendant claimed under a deed of settlement made by one trustee to another, both of whom were strangers to her for her benefit the deed was not signed by her, but in it she was described as the wife of B. *Id.*
- Held,* That she might claim under the deed without being estopped to deny that she was the wife of B. *Id.*

**INFANTS.**

1. Where a bill is filed having for its subject matter the estates and persons of infants, and service of the subpoena is had upon the defendant, the parties are at once in Court and the children in its custody and care, and it is a grave offense to remove them, pending the proceedings, from the Court's jurisdiction for the purpose of rendering the exercise of its authority and protection impotent. *Barney vs. Barney*, 1.
2. An order upon the defendant to show cause why he should not be punished for contempt for so removing the children is an interlocutory order and may be passed by a justice at chambers as well as in term. *Id.*
3. Where in such a case the defendant remains in contempt by refusing to comply with the order of the Court requiring him to bring the wards within the jurisdiction of the Court, his answer to the bill will be stricken from the files and the complainant will be allowed to proceed as in case of default. *Id.*

**INTERLOCUTORY ORDERS.** *See Practice (In Equity)*, 4.**JUDGMENTS.**

All persons who are represented by the parties to a judgment and claim under them or in privity with them are equally concluded by the judgment and the proceeding in which it was obtained. *Birdsall vs. Welch*, 316.

**JUDICIAL DISCRETION.**

Judicial discretion is the option which a judge may exercise between the doing and not doing a thing, the doing of which cannot be demanded as an absolute right of the party asking it to be done. *Alden vs. Hinton*, 217.

**JURISDICTION.** *See Circuit Court of the District of Columbia.*

This Court possesses jurisdiction concurrently with justices of the peace where the amount in controversy lies between fifty and one hundred dollars. *Dawson vs. Woodward*, 301.

JUSTICES OF THE PEACE. See *Jurisdiction*.

LANDS.

1. The Act of Congress of March 24th, 1862, limited the claims of the purchasers under the Vallejo title to such portions of the Soscot Ranch as had been reduced to possession and settlement, in the usual acceptation of those terms, *provided that* no single improvement and settlement embraced more than one quarter section of the tract in all cases where such claim interfered with existing established rights of pre-emption. *Whitney vs. Frisbie*, 262.
2. The Soscot Ranch was open to actual settlement and pre-emption in October, 1862, under the pre-emption act of 1841, and a settler having made an actual settlement and complied with all the terms and conditions required by law to complete his title, or tendered performance thereof, is entitled to a patent; he has obtained such an interest and vested title and property therein as cannot be taken from him and transferred to another against his consent even by an act of Congress. *Id.*
3. Nor does the Act of Congress of March 3d, 1863, interfere with such right, but rather protects the title of such a settler. *Id.*
4. Where one has wrongfully obtained from the Government a patent for land to which a settler is already entitled under the pre-emption laws, he holds such title as a trustee for such settler and will be required to convey it to the equitable owner. *Id.*

LANDLORD AND TENANT. See *Forcible Entry and Detainer*, 1-7.

1. The Maryland Act of 1793, ch. 43, is as applicable to the possession of a term less than a year as to those of one or more years. *Miller vs. Johnson*, 51.
2. A tenancy at will cannot arise in the District of Columbia without an express contract to that effect. Act of July 4, 1864. *Spalding vs. Hall*, 123.
3. Prior to July 4, 1864, where the tenant held over by consent, given either expressly or constructively, after the determination of a lease for years, this was a tenancy from year to year. In this District such tenancies, if they existed on the 4th of July, 1864, cannot be terminated by a notice of thirty days, but require a notice of six months to be given prior to the expiration of the yearly tenancy. *Id.*
4. The language of the first section of the Act of July 4, 1864, declaring "that the holding of lands or tenements by contract or lease, the *terms of which have expired*," &c., is to be construed as if it read, "the term of which has expired." *Id.*
5. What would have been a tenancy from year to year before the

LANDLORD AND TENANT. *Concluded.*

- passage of the Act of July 4, 1864, must now "be deemed and held to be" a tenancy at sufferance, and may now be terminated by a notice, in writing, of thirty days, served upon the tenant. *Id.*
6. All tenancies arising in the mode mentioned in the first section of the act, and continuing after its passage, can only be terminated in the manner prescribed by the law as it existed prior thereto, and when so terminated the landlord may proceed against the tenant to recover possession under the provisions of the second section of the act. *Id.*
  7. The tenancy at sufferance mentioned in the first section of the Act of July 4, is "a holding by contract or lease, the terms of which have expired;" viz., a holding by the express or implied assent of the landlord, but the common law tenancy at sufferance is a holding over *by wrong* after the determination of the tenant's interest, that is to say, a holding in opposition to and in defiance of the will of the landlord. In the first case a thirty day's notice to quit is necessary before the tenant can be proceeded against under the second section of the act, but in the latter case proceedings may be instituted under that section at once and without notice; the meaning and intent being, that whenever the tenancy *ends*, if the tenant does not quit the premises, the landlord may institute forthwith and without notice, this summary proceeding to obtain possession. *Id.*
  8. The tenancy ends when the period for which the premises are leased expires. If the parties make no agreement as to the length of time for which the premises are leased, the tenancy may be ended by a notice of thirty days, if such tenancy was created subsequently to the 4th of July, 1864. If it was created before that time, and is still subsisting, it can be ended only in the manner prescribed by the law as it existed before the passage of the act. *Id.*
  9. This summary remedy to recover possession is extended to all persons who, by the act of the lessor or by operation of law, are placed in the same relation to the tenant as the original lessor, to wit, the grantees, assignees, devisees or heirs-at-law of the lessor. *Id.*
  10. Therefore, where A obtains from the owner of the premises a lease thereof, to commence at the expiration of B's tenancy, A cannot avail himself of the provisions of the act, to recover the possession from B, who holds over after the expiration of his tenancy. *Id.*

## LEGAL TENDER.

1. The Act of Congress of February 25, 1869, ("The legal tender

LEGAL TENDER. *Concluded.*

- Act") and the subsequent Acts containing similar provisions, apply to ordinary bank deposits, and a tender of Treasury notes in payment of a check, drawn by a depositor, whose only deposits had been made before the passage of the Act and in gold coin, is a legal tender notwithstanding that the bank prior to the Act had always paid such checks in gold coin. *Thompson vs. Riggs*, 99.
2. The Acts of Congress known as the "Legal-tender Acts" are not unconstitutional. *Id.*

LIENS. See *Admiralty*, 3, 4.

MANDAMUS. See *Elections*, 1, 2.

## MUNICIPAL CORPORATIONS.

1. A municipality is only liable for the negligence of a licensee under its authority when it has notice of such negligence. *Herfurth vs. Corporation of Washington*, 288.
2. Whether exemplary damages can be recovered against a municipality for the negligence of its licensee, *quære*. The case at bar held on the facts to be, at all events, not one for exemplary damages. *Id.*

ORDINANCES. See *Georgetown; Inspection of Flour; Corporation Georgetown vs. Davidson*, 278; *Washington Elections, Alden vs. Hinton*, 218.

POLICE OFFICERS. See *Crimes and Misdemeanors*, 4, 5.

PRACTICE (At Law). See *Trespass*, 2; *Assignment*, 5; *Promissory Notes*, 4-6.

The joinder of husband and wife in an action where the husband is the sole debtor, is a fatal misjoinder of parties. *Worch vs. Kelly*, 252.

PRACTICE (In Equity). See *Infants*, 2, 3.

1. In equity very little reliance ought to be placed upon loose conversations or admissions of a party which are sought to overbalance his solemn denial on oath in his answer. *Purcell vs. Coleman*, 59.
2. Evidence of admissions of part performance of a parol contract to convey land are not admissible for the purpose of proving part performance. *Id.*
3. Where leave is asked to file a bill of review on the ground of newly discovered evidence, it must appear, 1st, that such evidence has come to the knowledge of the party or his agent



PRACTICE (In Equity). *Concluded.*

since the final decree was passed; 2d, that it is material—that is, of a character which would probably change the results of the cause if unanswered, or at least raise a question of so much nicety and difficulty as to be a fit subject of judgment in the cause, but it must not be merely cumulative evidence; and 3d, it must satisfactorily appear to the Court that the petitioner could not, by using reasonable diligence, have procured the evidence on the trial of the cause. *Id.*, 87.

4. On an appeal from a final decree of the Special Term, all interlocutory orders passed by the Court in the progress of the cause are subject to review by the General Term, except where such orders rest in the discretion of the presiding justice and do not affect the merits of the case. *Salter vs. Allen*, 182.
5. Where complainant is compelled to resort to a court of equity to obtain his rights in respect of a fund in controversy or relinquish them, and it appears on an account being taken that the defendants have not acted honestly, nor in obedience to the order of the Court, the costs will be charged against their share of the fund. *Id.*
6. In equity technical estoppels are not known, but proofs of that sort are considered as evidence to be received if competent, and considered only for what they are worth. *Brown vs. Beckett*, 253.
7. In civil, equally as in criminal cases, where the question at issue is the existence of a marriage, the affirmative must be made out by the party who asserts it. *Id.*
8. The setting down of a cause for hearing on bill and answer is to be taken as an admission by complainant of the truth of the whole of the answer, not only of the facts stated in direct response to the bill, but also of all those set up by way of affirmative defense. *Birdsall vs. Welch*, 316.
9. Whether it be on a trial by jury or in chancery, fraud in fact must be made out affirmatively by the party who makes the charge. *Id.*
10. Although courts of equity have concurrent jurisdiction with courts of law in all matters of fraud, yet when the cause has already been tried and determined at law, equity cannot take cognizance of it, unless there be an addition of some equitable circumstance to give jurisdiction, such as some defect of testimony or other disability which a court of law cannot remove. *Id.*

PRE-EMPTION. See *Lands*.

**PRINCIPAL AND AGENT.**

A principal is not liable in exemplary damages for the tort of his agent, unless he is derelict in connection with the offense of his agent. *Redword vs. Met. R. R. Co.*, 302.

**PROMISSORY NOTES AND BILLS OF EXCHANGE.** See *Damages*.

1. Promissory notes given for a gambling debt are void even in the hands of a *bona fide* indorser for value without notice of their origin. *Thompson vs. Bowie*, 91.
2. While the law presumes a promissory note to have been given for a valid consideration, yet the circumstances of the case may rebut that presumption, and it is then incumbent upon the holder to show the true consideration. *Id.*
3. Evidence that it was the habit of the maker of the promissory note to gamble when drunk, and that he was drunk on the day of the making of the note, and that the payee of the note was a professional gambler, is admissible for the purpose of showing that the note was given for a gambling debt. *Id.*
4. In an action against the indorser of a dishonored promissory note a new trial will not be granted because the plaintiff did not offer the note in evidence to the jury when it appears that the note was attached to the declaration, and that on the cross-examination of the defendant's witnesses the note was produced and proved. *Harmon vs. Moffit*, 297.
5. An indorser who is a party to the original contract for which the indorsed note is given is liable thereon if after its dishonor he promised to pay the same, even though no actual demand on the maker or notice of dishonor be proven on the trial. *Id.*

**REAL ESTATE BROKERS.** See *Contracts*, 4, 5.**REPLEVIN.**

1. Where personal property is claimed to have been conveyed to a trustee and is afterwards levied on to satisfy a judgment against the grantor, replevin by the trustee is the proper remedy to try the title to the property. *Selling vs. Kimmell*, 273.
2. In a replevin suit the marshal is only the nominal defendant; the real defendant is the party in whose name the execution issued. *Birdsall vs. Welch*, 316.

**SET OFF.**

A promissory note of the complainant held by the defendant in a judgment creditor's proceeding, cannot be allowed as a set-off against complainant's judgment, but the decree will be without prejudice to the defendant's right to proceed at law. *Birdsall vs. Welch*, 316.

SLAVES. See *Husband and Wife*, 2; *Fugitive Slave Act*.

SPECIFIC PERFORMANCE. See *Practice (In Equity)*, 1, 2.

1. Delivery of possession under a parol contract for the sale of land will not be sufficient of itself to entitle the vendee to specific performance. The possession must be united with the payment or expenditure of money in the purchase of improvement of the land. *Purcell vs. Coleman*, 59.
2. And the possession must have been taken with the consent of the vendor and in pursuance of the agreement, and must be such a possession as would subject the purchaser to an action of trespass unless he be entitled to a decree for specific performance. *Id.*

#### STATUTES.

The following, among others, commented on or explained in the cases cited:

#### ACTS OF CONGRESS.

- February, 1793 (fugitive slaves). *In Re Hall*, 10.  
 February 27, 1801 (Circuit Court D. C., crimes and misdemeanors). *In Re Hall*, 14; *U. S. vs. Griffin*, 58.  
 March 3, 1801 (fugitives from justice and labor). *In Re Hall*, 15.  
 May 13, 1820, secs. 5 and 6 (elections). *Alden vs. Hinton*, 218.  
 September 4, 1841 (Pre-emption). *Whitney vs. Frisbie*, 262, 268, 269.  
 May 17, 1848, secs. 3, 4, 5 (elections). *Alden vs. Hinton*, 218.  
 May 30, 1849, sec. 11 (elections). *Alden vs. Hinton*, 218.  
 September 18, 1850 (fugitive slaves). *In Re Hall*, 10.  
 October 17, 1850 (elections). *Alden vs. Hinton*, 218.  
 February 10, 1855 (naturalization). *Owen et al. vs. Kelly*, 191.  
 June 19, 1860 (divorce). *Hatfield vs. Hatfield*, 80.  
 June 19, 1860 (divorce). *Cheever vs. Wilson*, 149.  
 February 25, 1862 (legal tender). *Thompson vs. Riggs*, 99.  
 March 24, 1862 (land grants). *Whitney vs. Frisbie*, 262.  
 June 2, 1862 (pre-emption). *Whitney vs. Frisbie*, 263.  
 July, 1862 (engaging in Rebellion). *U. S. vs. Surratt*, 306.  
 March 3, 1863 (land grants). *Whitney vs. Frisbie*, 262, 263.  
 March 3, 1863 (Supreme Court D. C.). *U. S. vs. Huyck*, 304.  
 March 3, 1863 (Supreme Court D. C.). *In Re Hall*, 18.  
 March 3, 1863 (admiralty). *U. S. vs. The Hampton*, 75.  
 March 3, 1863 (*Habeas Corpus*). *In Re Dugan*, 131.  
 July 4, 1864 (landlord and tenant). *Spalding vs. Hall*, 123.  
 July 23, 1866 (stolen goods). *In Re Hotchkiss*, 168, 169, 172.  
 January 8, 1867 (elections). *U. S. Ex Rel. Langley vs. Bowen et al.*, 196, 201, 208.

**STATUTES. *Concluded.***

February 5, 1867 (elections). *U. S. Ex Rel. Langley vs. Bowen*, 196, 198, 200, 201, 202, 208.

**BRITISH STATUTES.**

5 and 15 Richard II (forcible entry and detainer). *Adams vs. Horr et al.*, 45; *U. S. vs. Griffin*, 53.

8 Richard II, chap. 8 (forcible entry and detainer). *U. S. vs. Griffin*, 55.

15 Richard II, chap. 2 (forcible entry and detainer). *U. S. vs. Griffin*, 55.

8 Henry VI, chap. 9 (forcible entry and detainer). *Adams vs. Horr*, 40; *U. S. vs. Griffin*, 55.

43 Elizabeth (trespass). *Cahill vs. Harris*, 214, 216.

22 and 23 Charles II (trespass). *Cahill vs. Harris*, 214, 216.

21 James I, chap. 15 (forcible entry and detainer). *Adams vs. Horr*, 41.

8 and 9 William III (trespass). *Cahill vs. Harris*, 214, 216.

9 Anne, chap. 14, sec. 1 (gaming). *Thompson vs. Bowie*, 93.

7 and 8 Victoria, chap. 66, sec. 16. *Owen vs. Kelly*, 192.

**MARYLAND ACTS.**

1719 (contempt), 171.

1785, chap. 80, sec. 1 (actions). *Roche vs. Carroll*, 79.

1793, chap. 43 (landlord and tenant). *Miller vs. Johnson*, 51.

**ACTS CORPORATION.**

Corporation laws, 39 (elections). *Alden vs. Hinton*, 218.

**ORDINANCES OF GEORGETOWN.**

July 24, 1852 (inspection of flour). *Corporation of Georgetown vs. Davidson*, 278.

**STOLEN PROPERTY. See *Crimes and Misdemeanors*, 3.**

**SUPREME COURT OF THE DISTRICT OF COLUMBIA. See *Jurisdiction; Fugitive Slave Act.***

**SUPREME COURT OF THE UNITED STATES. See *Appeal.***

**TAXES. See *Equity*, 1, 2.**

1. An act of Congress for the erection of a jail in the District of Columbia detailed the manner in which the work was to be done, and provided that one half the cost thereof should be paid by the Government, and the other half by a tax to be

**TAXES. *Concluded.***

levied upon the persons and property of the District, and placed the execution of the law under the supervision of the Secretary of the Interior. On a bill for an injunction filed by certain citizens of the District, stating themselves to be interested as tax payers in the proper execution of the law, and alleging an illegal departure by the Secretary from the direction of the statute in the erection of the building, the Court, without deciding as to its power to enjoin at the proper time the collection of the tax if the building were erected in an unauthorized manner, *Held*, that the bill in this case was premature and would only lie, if at all, when there was an attempt to collect the tax. *Adair vs. Browning*, 243.

2. A tenant in common cannot purchase an outstanding tax title to the common property and hold it against his co-tenants. In such a case he will be deemed to hold as trustee for the benefit of all. *Alexander vs. Douglas*, 247.
3. But he will be allowed for whatever permanent improvements he may have placed upon the property whilst in his possession, as well as his costs and expenses in the purchase of the tax title, and be charged on the other hand for the use and occupation of the land. *Id.*

**TONNAGE DUTIES.**

The power to lay a tax on commerce in the form of a tonnage duty on vessels is vested in Congress alone; hence an ordinance of the corporation of Washington which, under the name of "harbor fees," imposes such a duty on vessels coming to its port is void. *Mayor of Washington vs. Barnes*, 230.

**TENANTS IN COMMON. See *Taxes*, 2, 3.****TRESPASSES.**

1. Trespass upon land is the unauthorized entry of one person upon the land of another, and whether the trespasser supposed it to be his own or a third person's land makes no difference. *Cahill vs. Harris*, 215.
2. The English statutes of 43 Elizabeth and 22 and 23 Charles II, and 8 and 9 William III, regulating costs in actions of trespass, are not in force in this District. The plaintiff is entitled to full costs whether the trespass was willful or not, or whether the damages are nominal or not. *Id.*

**TRUSTS. See *Fraud*, 1, 2, 3.**

1. The plaintiff being the holder of a promissory note secured by deed of trust upon lands in Alexandria County, Virginia,

TRUSTS. *Concluded.*

made another trust deed, further securing it upon lands in the District of Columbia and then passed it to M., the defendant. The latter deed recited that "whereas the said S. is anxious to give to the said M. further and additional security for the payment of the said note in case the same is not realized from and under the aforesaid deed of trust on the lands in Alexandria County, now, &c." In a subsequent clause of the same deed it was provided that "if the said promissory note is not paid when the same shall become due, or be not within sixty days thereafter realized from and under the first deed of trust" then the trustee, in the second trust, should sell. It was contended that the latter trustee was not authorized to sell the lands in the District until the remedy was exhausted upon the land in Virginia, but it was *held* that the deed was to be construed as meaning that if the note was not paid at maturity or payment was not in some way obtained out of the land in Virginia within sixty days after the maturity of the note, the trustee might sell. *Swan vs. Morehouse*, 225.

2. The rule that the language of a deed shall be taken most strongly against the grantor is not to be resorted to unless all other rules of interpretation fail. *Id.*
3. Questions of trust are personal and not local, and are therefore subject to the jurisdiction of this Court, though the land in respect of which the trust has arisen is situated elsewhere. *Whitney vs. Frisbie*, 262.

Ex. J. J.

5564 119









